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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

515

SUPREME COURT OF ALABAMA,

DURING

DECEMBER TERM, 1877.

BY

JOHN W. A. SANFORD,

SPECIAL REPORTER.

40619

VOL. LIX.

MONTGOMERY, ALA. :

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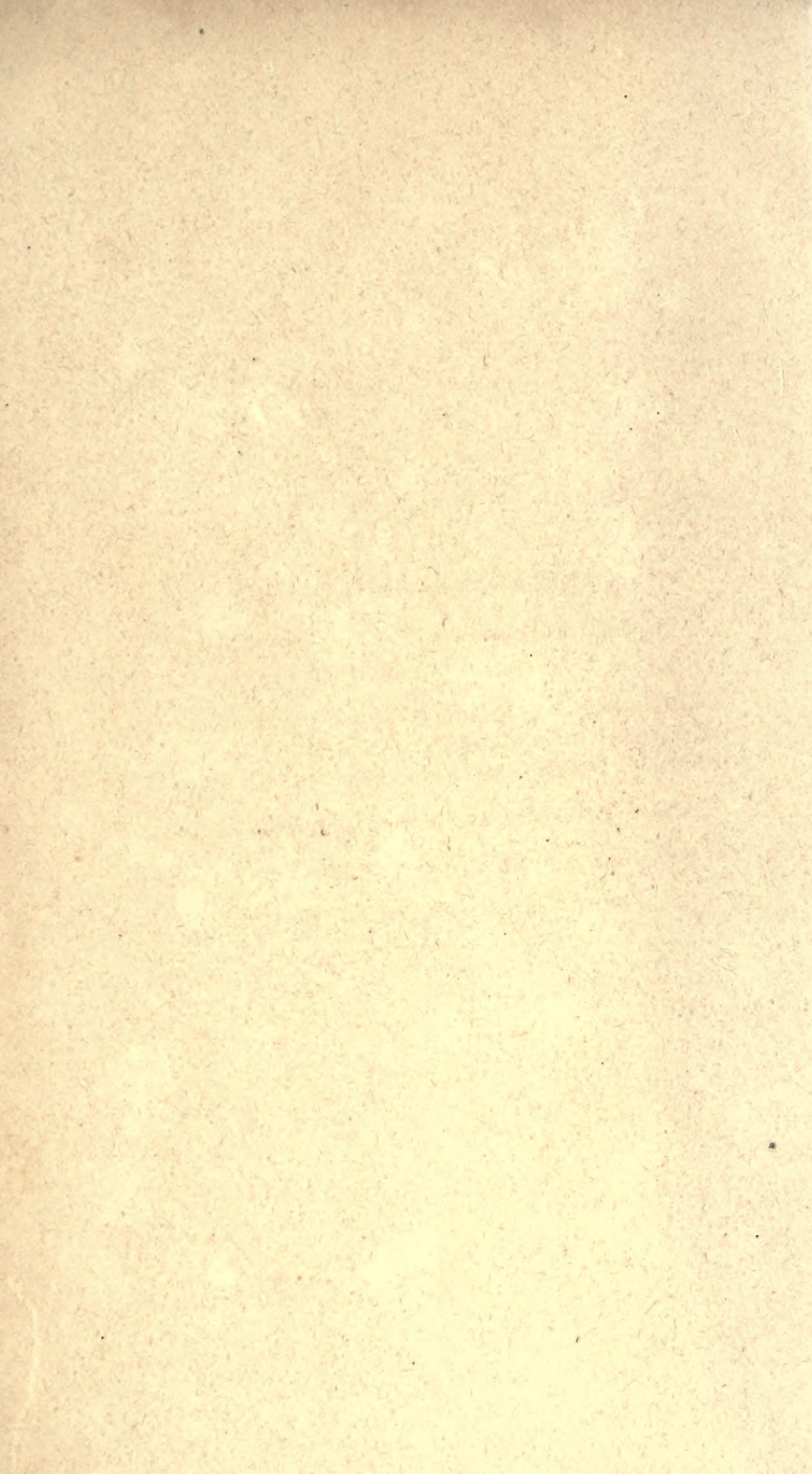
AMOS R. MANNING, ASSOCIATE JUSTICE, *Mobile, Ala.*

GEORGE W. STONE, ASSOCIATE JUSTICE, *Montgomery, Ala.*

JOHN W. A. SANFORD, ATTORNEY GENERAL, *Montgomery, Ala.*

THOMAS J. RUTLEDGE, CLERK, *Montgomery, Ala.*

JUNIUS M. RIGGS, MARSHAL, *Montgomery, Ala.*



TRIBUTE OF RESPECT
TO
JOSEPH WINTHROP MOSES.

At a meeting of the Bar of the City of Montgomery, held at the courthouse, on Friday, December 21st, 1877, on motion of Gen. J. T. Holtzclaw, Major Henry C. Semple was called to the chair, and Thomas H. Watts, Jr., was requested to act as secretary.

The chairman having explained the object of the meeting, on motion of Capt. F. S. Ferguson, a committee, consisting of F. S. Ferguson, W. L. Bragg, J. T. Holtzclaw, Thomas G. Jones, and P. T. Sayre, was appointed to prepare resolutions expressive of the grief of the Bar, caused by the death of Joseph Winthrop Moses.

The committee, through its chairman, reported the following resolutions, which were unanimously adopted, viz.:

Resolved, That the members of the Bar of Montgomery have heard with deep sorrow of the death of their esteemed brother, Joseph Winthrop Moses, and by it have sustained a loss which is well-nigh irreparable.

Resolved, That his character as a man and as a lawyer was above reproach; his learning extensive and accurate; his literary attainments varied and brilliant; and his conduct while living such as to command respect, win admiration, and attract affection; and that we will ever preserve the memory of his virtues and excellences as a precious legacy.

Resolved, That, in his life, so true to every obligation, so pure in every act, so gentle in every sentiment, youth has a most beautiful example, and age has something to cause it to renew its trust in humanity.

Resolved, That we deeply sympathize with the relatives of our deceased brother, and pray that God will have them in His merciful keeping.

Resolved, That the Attorney-General present these resolutions to the Supreme Court, the Solicitor to the Circuit Court, and the chairman of the meeting to the United States Court, and request that they be entered on the minutes of those courts.

Resolved, That the proceedings of this meeting be published in the city papers, and a copy of these resolutions be sent to the relatives of the deceased.

Resolved, That the members of the Bar, as a body, attend the funeral of the deceased.

HENRY C. SEMPLE, *Chairman*.

THOS. H. WATTS, JR., *Secretary*.

On the 4th day of February, 1878, the resolutions were presented to the Supreme Court, by Attorney-General John W. A. Sanford, who said:—

May it please the Court :

A short time ago, a long, black, slowly moving line crept through the streets of Montgomery and rested in the cemetery. It was the funeral procession of Joseph Winthrop Moses. He died in the noon of manhood, but his physical conformation was so unimpaired by vice or disease that it seemed as if with him, life's morning sunlight was still upon the hills, and its dew was on the flowers.

He had lived in Alabama only a few years, but he had so impressed himself on the people, that various societies and the city herself, were mourners at his grave. Feeling the common bereavement, the Bar of Montgomery adopted these resolutions.

There are objects, both in nature and in art, which always challenge and always defy accurate description. Often the colors and shapes of the evening clouds are so gorgeous, and beautiful, and evanescent, that neither the poet nor the painter can convey an adequate idea of their brilliancy and beauty. There are strains of exquisite music, which echo forever through the halls of Memory, but which language can neither describe nor preserve. So there are characters so rich in fine qualities, and so rare in their combination of them, that words utterly fail successfully to portray them. Such a character is the very fragrance of the soul itself, which the spirit may perceive, but which the brain can not analyze and the lips can only praise.

Of this class was the character of Joseph Winthrop Moses. He was so endowed by nature; so adorned by art; so affluent in all noble traits; so devoid of the greed of pelf and place which disgraces the times, and so free from those little, paltry aims of life that wriggle over the soul, disfiguring and minimizing it, that he seemed to belong to another sphere, and, by some mistake, to have strayed among mankind. This is not the exaggerated eulogy of too partial friendship, I knew him long and I knew him well.

He was born, reared and educated in the city of Charleston. There he was surrounded by the best influences of a community abounding in all the powers that can refine the heart, and brighten the intellect, and elevate the character, and develop manhood. He availed himself to the uttermost limit of these advantages of education and enlightenment. It is not strange then that he should have graduated at the college with honor, or that he should have acquired those habits and tastes by which he was subsequently distinguished.

As soon as his collegiate course was terminated, he entered as a law-student the office of Mr. Petigru. Stimulated by the example and precepts of that illustrious lawyer, wit and scholar, he continued the pursuit of all knowledges, professional, scientific, literary and artistic. He was early convinced that eminence as an advocate could only be obtained through the broadest culture; for he had learned that, with a few notable exceptions, the most renowned lawyers, from Cicero to Legare, had been as remarkable for their literary and philosophical pursuits as they were for their professional attainments. Consequently, not content with the literature of our tongue, to-day unsurpassed in its riches, he became proficient in other languages. He was not only master of English (in which he possessed critical skill), but he knew also Hebrew, and Greek, and Latin, and French, and German, and Italian and Spanish. In some of these he conversed with fluency, and he read and translated all of them without difficulty. He was so gifted that these acquirements were easily made. Indeed, so thorough was his mental discipline that no intellectual exercise required labor, or was ever irksome to him.

His versatility was as uncommon as the ease with which he accomplished his appointed tasks. He could compose with equal facility verses to the belle of a ball-room, or a poem in commemoration of the Confederate dead; a lecture on humor, or a funeral oration; a discourse upon art, or a brief in a law-suit; a constitution and charter for a literary club, or resolutions celebrating the virtues of a deceased patriot; an editorial on party politics, or a

report on the educational system of the city; a criticism of an opera, or a disquisition upon the Jews, their history and influence upon mankind. And he had this happiness: Whatever he did, whether written or spoken, in "prose or numerous verse," was done so thoroughly, gracefully and well, that he seemed born to do that alone. We are not surprised, therefore, that on his admission to the bar Mr. Petigru should have said, he had one of the brightest intellects he had ever known.

His moral traits were no less noteworthy than his intellectual capabilities. He was a Hebrew by blood and in religion, and was superbly proud of his race, and zealously and humbly devoted to his faith; and yet he so practised all the virtues inculcated by Christ, that I may say of him as Pope said of Garth: "The best good Christian he, although he knew it not." His spirit was unstained—it was scarcely darkened by the shadows of earth. He was altogether exempt from vices. He was unselfish, and generous, and charitable, and so benevolent that he felt like the old Roman, who believed God had "made man many that they might aid one another."

He had an exalted ideal of life, and sympathized with all that is good, and pure and grand in human thought, or noble and heroic in human conduct. He was sincere and earnest and strong in his convictions, but temperate in his expression of them. He was ardent and constant in his friendship, but he rarely exhibited his feelings. He was calm and self-poised in all circumstances. The vicissitudes of the world affected him but slightly. He

"Was just of the quiet kind,
Whose natures seldom vary:
Like streams that keep a summer mind,
Snow-hid in January."

He had self-control and amiability to an unusual degree. Tranquillity was his normal condition. Anger never disturbed his equanimity. Indignation sometimes burned along his veins when injustice was done the poor and ignorant, and humble, and defenseless; or when an act of signal depravity or atrocity fell under his observation.

No violent passions, or ungovernable or barbarous impulses, ever swerved him from the behavior of a being entirely civilized. He never knew the ferocity of hatred, or bore the burden of an unforgiven grudge, or felt the sting of a regretted meanness. Fidelity to friends and to principles; truthfulness in all things; frankness in advising when his advice was sought; courage and an aversion from causeless conflict; prudence in speech and in action; a faultless sense of justice; manliness; robust gentleness, and knightly courtesy, were a few of his characteristics.

Time will not permit me to enumerate all the qualities that made his character so perfect, and himself so well beloved. We could reckon all the days of his life, not by the revolutions of the seasons, or the course of the sun, but by the circle and zodiac of his virtues, which have made him immortal. And yet he was modest, unobtrusive and apparently unconscious of his manifold powers. For his excellences stood in him so silently they seemed to have stolen upon him without his knowledge.

Verily, he was a gentleman, "take him all in all," of so many and such rare perfections that Sidney or even Lee, would have loved to call him—friend. And—

"In these ears till hearing dies
One set slow bell will seem to toll,
The passing of as sweet a soul
As ever looked with human eyes."

For gentle as he was, the only pain or sorrow he ever caused his kindred, or the world, was—when he died.

If it be true, as a wise Emperor has said, that "a man is worth just so much as those things are worth about which he busies himself;" if the possession of uncommon talents and great qualities entitle a person to be con-

viii TRIBUTE OF RESPECT TO J. WIN. MOSES.

sidered great, then our departed friend had surely a claim to such a rank ; but just as surely his humility would never have enforced it.

It is fit that some record of the virtues of such a man should be kept and his memory saved from "the tooth of time and razure of oblivion."

Therefore, I move that the resolutions may be spread on the minutes of the Court.

The resolutions were then ordered by the Court to be spread upon its minutes.

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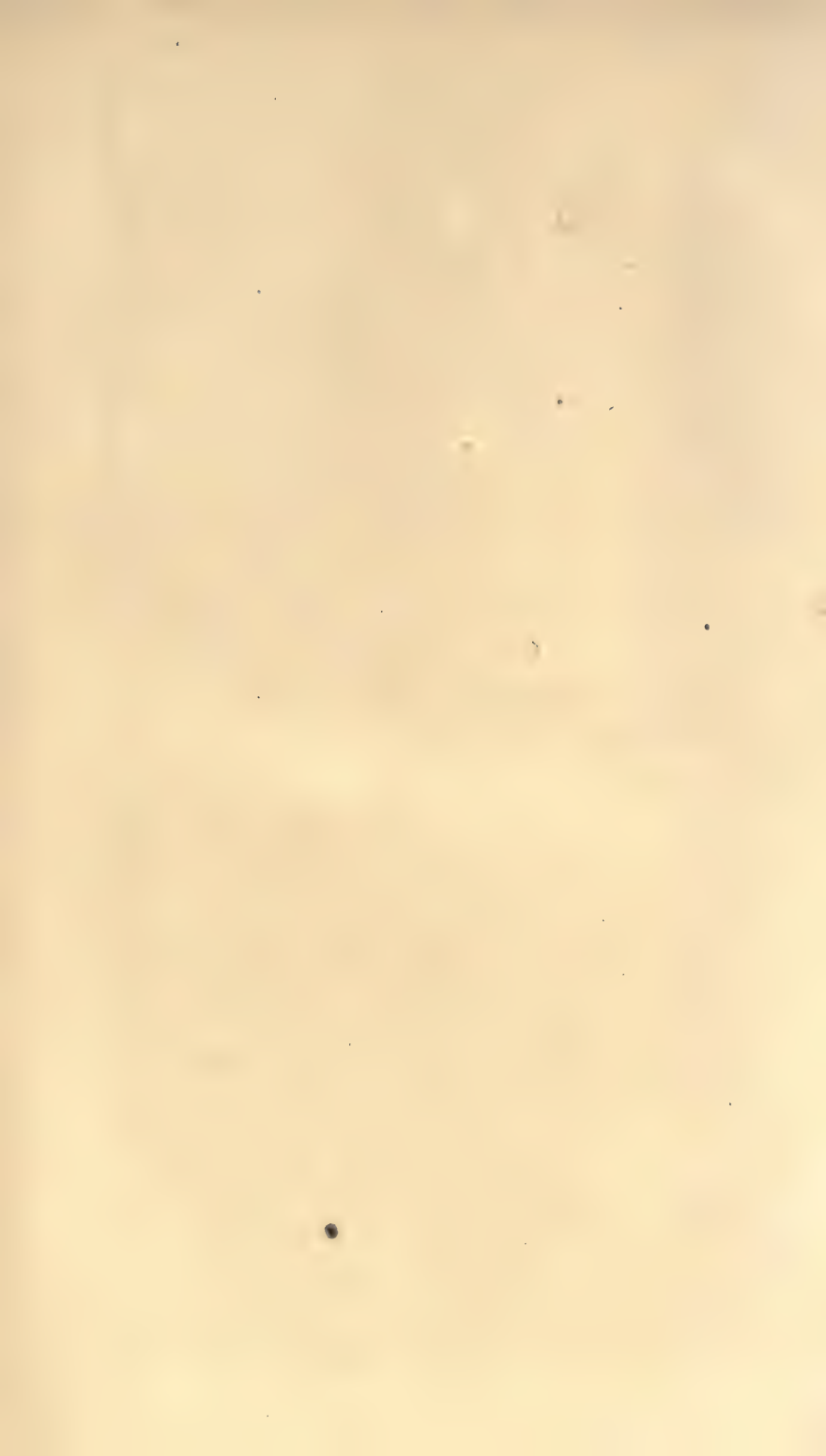
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CASES

IN THE

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1877.

Simpson v. The State.

Assault with Intent to Murder.

1. *The measure of evidence necessary to sustain indictments.*—Indictments under the Code are abridged in form, and contain legal conclusions rather than the facts which support them, but the nature of the offence is not changed, and the conclusions stated must be sustained by the same measure of evidence, which would be necessary if the facts on which they depend were fully expressed.

2. *The intent must be proven as a fact.*—On the trial of an indictment for an assault with intent to murder, the intent can not be implied as matter of law, and the jury must determine its existence from all the evidence in the case; and the court invades their province, if a part only of the facts is singled out and they are instructed to infer the felonious intent from them.

3. *Self-defence; except in extreme cases, can not endanger life.*—Every one has the right to defend his person and property against unlawful violence, and may employ as much force as is necessary to prevent injury. But this principle is subject to the qualification that he shall not, except in extreme cases, endanger life, or inflict great bodily harm.

4. *Life can not be taken to prevent a mere trespass.*—It is a principle of the criminal law of the State, that for the prevention of a mere trespass upon property—not the dwelling-house—human life can not be taken, or grievous bodily harm inflicted; consequently, if in the defence of property, other than the dwelling-house, life is taken with a deadly weapon, it is murder, although the homicide may be actually necessary to prevent the trespass.

5. *The protection due to property is not enlarged by the secrecy of the trespass.*—The law declares with certainty the protection due to property, and defines the force which may be employed in the defence. And neither the secrecy of the trespass, nor the frequency of its repetition enlarges the one or the other.

6. *The degree of homicide caused by a mischievous engine planted on the premises, depends on the nature of the weapon.*—If an owner of land, by

[Simpson v. The State.]

means of spring-guns, or other mischievous weapons planted on his premises, causes death, he is guilty of criminal homicide. Its degree will depend on the nature of the instrumentality used. If it be a deadly weapon, the killing will be murder.

7. *A specific felonious intent must be proven.*—To authorize a conviction of an assault with intent to murder, a specific felonious intent must be proven. This is an indispensable element of the offence. The doctrine of an intent implied by law different from the intent in fact, can have no application to the crimes punished by section 3670 of the Code. If there was not the intent to murder the person assaulted, although there may have been a general felonious intent, a conviction of the aggravated offence would be improper.

8. *It is unlawful to plant spring-guns.*—The common law of England is not in all respects the common law of this country; and the rule which once prevailed there, that allowed the owner of property to set spring-guns to protect it against trespassers, is inconsistent with our customs and institutions, and has never obtained in this State.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The defendant was indicted at the July term, 1879, for an assault with intent to murder Michael Ford. The bill of exceptions in this case shows, "that Michael Ford owned and resided on a lot near the city of Montgomery; and that defendant owned and resided on a tract of land adjoining, and west of the lot of Ford. The two lots were divided by a line fence five feet high, made of plank placed closely together. The residence of the defendant was on the west side of his premises, and fronted to the west, and the rear or eastern part of the lot adjoined Ford's. This constituted defendant's garden, in which he raised vegetables for market. It, as well as a large part of Ford's lot, had been subject to overflow. To protect his land from inundation, the defendant had made a semi-circular embankment about four feet high around his garden, with a ditch on its outside; but inside of the line fence, and on the property of the defendant.

"The said Ford testified, that about daylight on the third day of April, 1877, he went down into his field to replace dirt around his potatoes, and when he had reached a point about the width of a street from the line fence between himself and Simpson, he was shot by some person unknown. He heard the report, and saw the flash of the gun, but did not see any person. The gun appeared to have been shot from the ditch of the defendant. Three shot took effect upon his face, one putting out his left eye, and one in his neck, penetrating the larynx."

Another witness testified, "that he saw the defendant go up out of his ditch in the lower part of his garden, to his house, with something dark-colored in his hand, too long for

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a walking-cane, and had the appearance of being a gun; and there were the tracks of a man, and the print of the butt of a gun, at the point, whence the witness saw Simpson go in the morning.

There was evidence of enmity between Simpson and Ford. In an altercation between them, Ford charged Simpson with stealing his clay, and said that "he who would steal God's foot-stool would rob the grave;" and Simpson replied, "God-damn you, you will fall by my hand yet." Ford answered, "I am not afraid of you, if you don't shoot."

It appeared, also, that the defendant had owned a spring-gun for a number of years; "and that, four or five years ago, he had put up a wooden placard on the roadside in front of his house, warning the public to beware of spring-guns and man-traps. The notice remained awhile and rotted down, and had not been seen for some time prior to the third of April, 1877. The defendant had been in the habit of setting the spring-gun in his crib.

Before the third of April, 1877, the defendant habitually set the spring-gun in the lower part of his garden, at night, and took it away before sunrise every morning. Before he did this, repeated depredations and injuries to defendant's garden, such as tearing down the defendant's fence and breaking down his embankment, had been committed by unknown persons in the night-time. "The spring-gun was set early in the night of April 2, 1877, at the bottom of his garden, and on the next morning the spring-gun was found discharged, and the cord attached to the trigger, and connected with a small stake in the embankment, broken. Drops of blood, appearing to be recently shed, and fresh tracks of persons on the embankment in front of the said spring-gun, were also discovered. A short time after seven o'clock on the morning of the third of April, 1877, the defendant took up his spring-gun and carried it to his house.

"At the request of the counsel for the State, the court gave the following charges, which were in writing, and each was severally and separately excepted to by the defendant, as it was given:

1. "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, Thomas Simpson, shot Michael Ford with a gun, with the intent to murder him, the said Michael Ford, as charged in the indictment in this cause, and that said shooting occurred in Montgomery county, in the State of Alabama, during the month of April in the year 1877, then the jury must find the defendant guilty as charged in the indictment.

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2. "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, Thomas Simpson, shot Michael Ford by means of, and with a spring-gun, with intent to murder him, the said Michael Ford, as charged in the indictment in this cause, and that said shooting occurred in Montgomery county, in the State of Alabama, during the month of April in the year 1877, then the jury must find the defendant guilty as charged in the indictment.

3. "That a trespass upon the garden of the defendant, Thomas Simpson, or depredations upon the vegetables growing in said garden, or depredations to the fencing around said garden, or depredations committed against the water-gap in said garden, in neither event could justify said Simpson in using a deadly weapon against a person committing any of said trespasses or depredations; and if the jury believe from the evidence, beyond a reasonable doubt, that in the month of April in the year 1877, in Montgomery county, Alabama, said Simpson set a loaded spring-gun in his garden with intent to murder Michael Ford, as charged in the indictment, while said Ford might be engaged in committing some, or any, or all of said trespasses or depredations, or to prevent the said Ford from committing said trespasses or depredations, and that by the means thereof, in the month of April in the year 1877, said Michael Ford was shot by said spring-gun in Montgomery county, Alabama, then the jury must find the defendant guilty as charged in the indictment.

4. "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, Thomas Simpson, shot Michael Ford, during the month of April, 1877, in Montgomery county, Alabama, with the intent to murder said Ford, as charged in the indictment, then they must find the defendant, Simpson, guilty as charged in the indictment, no matter whether said shooting was done by a spring-gun or any other kind of a gun.

5. "That if the jury believe from the evidence, beyond a reasonable doubt, that said Simpson shot said Ford, during the month of April, in the year 1877, in Montgomery county, Alabama, with the intent to murder said Ford, as charged in the indictment, in pursuance of threats which had previously been made by said Simpson against the life of said Ford; and if the jury believe from the evidence, beyond a reasonable doubt, that such threats were so made, and in pursuance thereof such shooting occurred, then the jury must find the defendant, Simpson, guilty, as charged in the indictment.

6. "The law presumes every man to intend the necessary

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consequences of his own acts, and if a man shoots another man with a deadly weapon, the law presumes that by such shooting he intended to take the life of the person thus shot.

7. "Malice is an essential ingredient of an assault with intent to commit murder, but if one man shoots another man by means of a spring-gun to prevent a trespass upon his garden, or to prevent depredations upon the fencing around his garden, or to prevent depredations upon a water-gap in his garden, in either event the law implies malice in such shooting, or if such shooting in either event was done in pursuance of previous threats made by the person shooting, against the person shot, then the law presumes malice from such a shooting with such a weapon."

The defendant then requested the court to give the following charges in writing:

1. "That the law gives every man the right to protect his property from assault and destruction by unknown persons who avail themselves of the cover and secrecy of darkness to destroy the same, by all the means necessary to that end, provided he does not thereby endanger the safety of the public; and whether the means he adopted for that end, are reasonable and proper and consistent with a due regard for the public safety, is a question for the jury.

2. "Though a man has no right to take life in defence of his property against a mere trespasser, yet when the injury is grievous in its character, and secret and repeated, and done by unknown persons under cover of darkness, the party injured may resort to any means necessary and proper for the protection of his property, consistent with the safety of the community, and whether the means adopted is necessary and reasonable and consistent with the rights of others, is a question for the jury."

The court refused these charges severally as requested, and the defendant excepted to each refusal.

ARRINGTON & GRAHAM, and RICE, JONES & WILEY, for appellant.—1. The effect of the sixth charge is that the jury is bound to presume the fact of intent from the shooting, and the character of the instrument used. The charge is in palpable violation of a principle announced in repeated decisions of this court. It invades the province of the jury. When all the evidence is before the jury no one fact can be singled out or disconnected from the others, and malice or any other essential of the crime be inferred from it.—52 Ala. 333. A man may shoot another with a deadly weapon and still be

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innocent of the intent to take life.—23 Ala. 42. The circumstances of this case, and especially the fact that the gun was loaded with small shot, illustrates this principle; and it should have been left to the jury to determine whether the defendant intended to take the life of the particular person who discharged it.—33 Ala. 413; 28 Ala. 693; 18 Ala. 534; 45 Ala. 82; 1 Bish. Cr. Law, §§ 514-15; Cases of Self-defence, p. 343.

2. It is error to require the jury to infer the existence of malice from a part of the facts taken from the mass of the evidence in the case.—52 Ala. 332; 45 Ala. 82; 47 Ala. 564.

3. All the charges, except, perhaps, the first, are erroneous, because, when a man sets a spring-gun and goes away, and another comes and springs it, he is not guilty of an assault. In assault there must be immediate peril, real or apparent; there must be a force actually put in motion. 1 Russ. on Cr. (marg.) p. 604; 1 Ired. 128; 2 Bish. Cr. Law, §§ 32, 34, 36; 1 Chitty on Plead. pp. 126, 127, 133, 167, 168. The assault, under the statute, must be actual, not constructive.—Code of 1876, § 4314; 1 Bish. Cr. Law, § 131.

4. Setting a spring-gun under the circumstances disclosed by the bill of exceptions, is lawful.—3 Stew. 481; 7 Marsh. (Ky.) 478; 1 Esp. 203; 3 Barn. & Ala. 304; Sher. & Redf. on Neg. § 509. The language of the statute—7 and 8—of George IV., “whereas, it is expedient to prohibit the setting of spring-guns,” &c., shows it was lawful at common law. There is no statute on the subject in Alabama. If anything more was needed, it is sufficient to say that while the practice of setting spring-guns has prevailed since guns came into use in the fourteenth century, not a case can be found in the reports of England or America, where any one has been prosecuted for shooting another with a spring-gun.

5. If the act was lawful when done, the party can not be held responsible for the consequences, and the intent is immaterial.—5 Seld. 444. The only exception to this rule is when the act is the beginning, or proximate to an offence or an attempt.—1 Bish. Cr. Law, §§ 314, 318; 12 N. H. 42. The second charge, therefore, should have been refused.

6. Charge numbered three is based on the ancient principle, that it is lawful to kill to prevent a felony, but it would be murder or manslaughter to slay to prevent a trespass. The reason for the rule has ceased. Formerly all felonies were punishable with death. Now, in Alabama, while felonies are numerous, few are punishable capitally. It is a felony to steal one ear of corn, or one boll of cotton,

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and it is only a misdemeanor to cut a bank by which whole acres of corn and cotton may be flooded.—53 N. H. 404; 7 Marsh. (Ky.) 478; 24 Ala. 67. But this ancient rule has no application, where the trespass is not committed in the party's presence.—*Scott v. Wilkes* 3 B. & Ald. 316, 317; 7 Taunt. 520; 17 Wend. 498.

7. Where the wrongs are greatly injurious and repeated, and done in secret and by unknown parties, and under such circumstances that the law is powerless to afford him a remedy, the only limit of his mode and measure of defence is the necessity of his case, and the rights and safety of his fellow-citizens. And whether the defendant has overstepped these, we repeat, are questions for the jury.—53 N. H. 404; 7 Marsh. (Ky.) 478.

8. The indictment must be framed in reference to the statute, and conform to its letter and spirit. It can not be aided by intendment, and must state positively and explicitly what the defendant is called upon to answer.—3 Stew. 131; 50 Ala. 128; 21 Ala. 223; 53 Ala. 488. The defendant can not be charged with a particular offence alleged to have been committed by a particular means, and convicted of another offence committed by other means. It is not sufficient to prove a general felonious intent, or any other specific intent than that alleged.—28 Ala. 693.

9. The indictment should have contained different counts to meet the various phases of the case.—Arch. Cr. Plead. pp. 470-1-2; 30 Ala. 13.

BRAGG & THORINGTON, for the Attorney-General, *contra*.

1. Charges are construed in connection with each other, and with the evidence to which they are applied; and if, when thus construed and applied, they are correct, though as universal propositions they may be erroneous, they do not warrant a reversal of the judgment.—1 Brick. Dig. p. 345, § 141; 26 Ala. 31. When thus construed and applied there is nothing either in the sixth or seventh charges to warrant a reversal in this case. Each of these charges were but instructions by the court as to presumptions of law upon the evidence.—28 Ala. 701.

2. Each of the charges, from one to five, both inclusive, went to the conviction of the accused. Each charge distinctly directed the jury that there could be no conviction unless the specific intent to murder Ford was proved beyond a reasonable doubt, which necessarily included malice as well as every other essential ingredient of the offence.—1 Brick. Dig. p. 806, § 44; 37 Ala. 123.

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3. The evidence fully justified the seventh charge, and the presumption of law, as there stated, is correct. There is nothing in it of which the defendant can complain, or ought to cause a reversal of this case.—1 Brick. Dig. p. 806, § 44; ib. p. 34, § 141; 23 Ala. 28; 26 Ala. 31. “When a man commits an unlawful act unaccompanied by any circumstances justifying the commission of it, it is a presumption of law that he has acted advisedly, and with an intent to produce the consequences which have ensued.”—Roscoe Cr. Ev. 20, and authorities; 1 Greenl. Ev. §§ 14, 18; 3 id. §§ 14, 15, and notes; 1 Brick. Dig. p. 806, § 44. “An assault with intent to kill can not be justified on the ground that it was necessary for the defence of property. The law in this respect must be the same as exists in homicides.”—2 Whart. Cr. Law.

4. There is a well-recognized distinction between a presumption of law and a presumption of fact. A presumption of fact supplies the place of proof—it is proof. A presumption of law is not proof. Presumptions of law, like those asserted in charges six and seven, are disputable, and may be contradicted by evidence, or explained.

5. The charge upon which the case of *Moore v. The State* (18 Ala. 534), was reversed, is unlike any charge in this case. That charge ignored the question of specific intent, and for that cause was held vicious. No charge here given ignores the question of a specific intent; but, on the contrary, the charges are predicated upon the hypothesis that the specific intent must be proved beyond a reasonable doubt, like any other question of fact.

BRICKELL, C. J.—The indictment contains a single count, charging, in the prescribed form, the defendant with an assault with intent to murder one Michael Ford. It is founded on the statute (Rev. Code, § 3670), which reads as follows: “Any person who commits an assault on another, with intent to murder, maim, rob, ravish, or commit the crime against nature, or who attempts to poison any human being, or to commit murder by any means not amounting to an assault, must, on conviction, be punished by imprisonment in the penitentiary, or hard labor for the county, for not less than two, or more than twenty years.” It is apparent the statute was intended for the punishment of several distinct offences, the elements of each being an act done, which of itself, though it may be an indictable offence, is aggravated by the intent attending it, and the higher offence

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contemplated. Each was an offence known to the common law, indictable and punishable as a misdemeanor. We do not mean, of course, that each was at common law recognized as a separate, distinct, technical offence. An assault was a misdemeanor; if attended with a felonious intent, the intent was a matter of aggravation, justifying the imposition of severer punishment—not other or additional punishment—than that inflicted on misdemeanors, but severer in degree. *Beasley v. State*, 18 Ala. 534; *Meredith v. State*, in manuscript; 2 Whart. Cr. Law, § 1287; 2 Arch. Cr. Pl. 285, note. And so at common law, an attempt to poison, or by any means to commit murder, or to commit any felony, in itself is a misdemeanor.—3 Whart. Cr. Law, § 2696. We repeat, the statute provides for the punishment of several distinct offences, known to the common law. It does not declare the constituents of either offence; it is silent as to the facts which must concur, to constitute the felonious assault, or the felonious attempt. These must be ascertained from the common law, and if the statute had not prescribed the forms of indictments, or declared the averments it is necessary to make, the offence must have been described as at common law—the facts constituting the assault or attempt, must have been stated and connected with an averment of the felonious intent or design.—*Beasley v. State*, *supra*. Though indictments are abridged in form, and reduced to a statement rather of legal conclusions, than of the facts which support, or from which the conclusions may be drawn, the nature of offences is not changed, and the conclusion stated must be sustained by the same measure of evidence which would be necessary, if the facts on which it depends were stated. It is the assertion of a mere truism to say, that if an indictment charges one of these offences, it can not be supported by evidence of another. As in the present case, the charge of an assault with intent to murder, is not supported by evidence of an assault with intent to maim, or to commit either of the other designated felonies. Nor yet, would it be supported by evidence of an attempt to poison, or to commit murder, by means not amounting to an assault. The offence charged must be proved, and an essential element of the present offence is not only an assault with intent to murder, but the specific intent to murder Ford, the person named in the indictment. If the intent was to murder another, or if there was not the specific intent to murder Ford, there can not be a conviction of the aggravated offence charged, though there may be of the minor offence of assault, or of assault

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and battery.—*Barnes v. State*, 49 Miss. 17; *Jones v. State*, 11 Sm. & Mar. 315; *Ogletree a. State*, 28 Ala. 693; *Morgan v. State*, 33 Ala. 413; *State v. Abram*, 10 Ala. 928.

The intent can not be implied as matter of law; it must be proved as matter of fact, and its existence the jury must determine from all the facts and circumstances in evidence. It is true, the aggravated offence with which the defendant is charged can not exist, unless if death had resulted, the completed offence would have been murder. From this, it does not necessarily follow, that every assault from which if death ensued, the offence would be murder, is an assault with intent to murder, within the purview of the statute, or that the specific intent, the essential characteristic of the offence, exists. Therefore, in *Moore v. State* (18 Ala. 533), an affirmative instruction, "that the same facts and circumstances which would make the offence murder, if death ensued, furnish sufficient evidence of the intention," was declared erroneous. The court say: "There are a number of cases, where a killing would amount to murder, and yet the party did not intend to kill. As if one from a house-top recklessly throw down a billet of wood upon the side-walk where persons are constantly passing, and it fall upon a person passing by and kill him, this would be, by the common law, murder; but if instead of killing him, it inflicts only a slight injury, that party could not be convicted of an assault with intent to murder." Other illustrations may be drawn from our statutes; murder in the first degree may be committed in the attempt to perpetrate arson, rape, robbery, or burglary, and yet an assault committed in such attempt, is not an assault with intent to murder. If the intent is to ravish, or to rob, it is under the statute, a distinct offence from an assault with intent to murder, though punished with the same severity. And at common law, if death results in the prosecution of a felonious intent, from an act *malum in se*, the killing is murder. As if A shoot at the poultry of B, intending to shoot them, and by accident kills a human being, he is guilty of murder.—1 Russ. Cr. 540. Yet, if death did not ensue, if there was a mere battery, or a wounding, it is not, under the statute, an assault with intent to murder. The statute is directed against an act done, with the particular intent specified. The intent in fact, is the intent to murder the person named in the indictment, and the doctrine of an intent in law different from the intent in fact, has no just application; and if the real intent shown by the evidence is not that charged, there can not be

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a conviction for the offence that intent aggravates, and in contemplation of the statute, merits punishment as a felony. *Ogletree v. State, supra*; *Morgan v. State, supra*. As is said by Mr. Bishop, the reason is obvious, the charge against the defendant is, that in consequence of a particular intent reaching beyond the act done, he has incurred a guilt beyond what is deducible merely from the act wrongfully performed; and therefore, to extract by legal fiction from this act such further intent, and then add it back to the act to increase its severity, is bad in law.—1 Bish. Cr. Law, § 514.

An application of these general principles, will show that several of the instructions given by the City Court were erroneous, and some of them misleading, or invasive of the province of the jury. The *sixth*, asserts the familiar principle of the law of evidence, that a man must be presumed to intend the natural and probable consequences of his acts, and from it draws the conclusion, "that if a man shoots another with a deadly weapon, the law presumes that by such shooting, he intended to take the life of the person shot." Whether this instruction would, or would not be correct, if death had ensued from the shooting, and the defendant was on trial for the homicide, it is not now important to consider. In a case of this character, the instruction is essentially erroneous, for if it has any force, it converts the material element of the offence, the intent to murder a particular person, into a presumption of law, drawn from the nature of the weapon, and the act done with it; while the intent is a fact which must be found by the jury, and the character of the weapon, and the act done, are only facts from which it may or may not be inferred. The weapon used, and the act done, may in the light of other facts and circumstances, import an intent to maim, or merely to wound, distinct offences from that imputed to the defendant; and maiming or wounding, is a probable, natural consequence of the act done, with such weapon. In *Morgan v. State* (33 Ala. 413), the court at the request of the defendant charged the jury, "that they must be convinced beyond all reasonable doubt, that the prisoner intended to shoot Scrimshire," (the prosecutor), "before they can convict the prisoner of an assault with intent to murder," but added, referring to the particular facts of the case, "that the presenting of a pistol, loaded and cocked, within carrying distance, by one man at another, with his finger on the trigger, in an angry manner, is, of itself, an assault with intent to murder." This court said: "The explanatory charge given by the

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court in this case can not be supported. It ignores one of the material facts which constitute the offence for which the prisoner was on trial. The defendant was not guilty as charged, unless he committed the assault, and this act was done with a special intent to kill and murder the person assaulted." It was said the facts were proper for the consideration of the jury, and (quoting from *Ogletree v. State, supra*), that it was competent for them, in their deliberations, "to act upon the presumptions which are recognized by law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence. It does not, however, result as a conclusive presumption at law, from the facts supposed in the charge, that the accused had the intent to take the life of Scrimshire: the surrounding circumstances should have been considered by the jury; and unless the jury were convinced that the prisoner entertained the particular intent to take the life of his adversary, then the prisoner could not be convicted of the higher crime. The particular intent reaches beyond the act done, and is a fact to be found preliminary to conviction, as necessary to the other fact itself, viz: that the assault was committed. In other words, while the law permits and commands juries to indulge all reasonable inferences from the facts in proof, it does, *proprio vigore*, infer the one fact from another." In *Seitz v. State* (23 Ala. 42), a similar question was considered. On an indictment for an assault with intent to murder, the jury returned a special verdict, finding the defendant "guilty of striking with a loaded whip, calculated to produce death, without any excuse or provocation," on which judgment of conviction was pronounced, which was reversed, because it was not a legal conclusion from the facts stated, that the defendant had the particular intent to murder the person assailed. "An assault simply with intent to frighten," say the court, "maim or wound, without producing death, or for the purpose of inflicting punishment or disgrace, is equally consistent with the finding of the jury, as that it was an assault with intent to murder." The true principle is, that the particular intent, the intent to murder the person assailed, is matter of fact, about which the law raises no presumptions, and indulges no inferences.—*State v. Stewart*, 29 Mo. 419. The jury must find the fact; and in ascertaining its existence, they may and will draw inferences from the character of the assault, the want, or the use of a deadly weapon, and the presence, or

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absence of excusing or palliating circumstances.—*Meredith v. State*, in manuscript. What are the presumptions or inferences in view of all the facts, they must be left free to determine; and the court misleads them, and invades their province, if a part only of the facts is singled out, and they are instructed from them, the felonious intent must be inferred.

The particular facts of the case, in one phase, in which the evidence presents it, are so interwoven with the remaining instructions, that a determination of the primary question they involve is necessary to a correct understanding of them. This question is the right of a land-owner to plant spring-guns on his premises, by which trespassers may be wounded, and what is his liability, if thereby a trespasser receives grievous bodily harm. Whether he was civilly liable at common law, was agitated in *Deane v. Clayton* (7 Taunt. 518), but not decided, the judges being equally divided in opinion. In *Ilott v. Wilkes* (3 Barn. and Ald. 304), the court of King's Bench unanimously decided that "a trespasser having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, can not maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off." Statutes followed soon after this decision, rendering persons setting or placing spring-guns, and other like agencies, calculated to destroy human life, or to inflict grievous bodily harm on trespassers, or others coming in contact with them, a misdemeanor.—1 Russ. Cr. 783. It is not our province to deny that the decision in *Ilott v. Wilkes* is a correct exposition of the common law of England as it then existed. The common law of England, is not in all respects the common law of this country.—*Vanness v. Packard*, 2 Pet. 144. This court has frequently said, that in this State, only its general principles, which are adapted to our situation, and not inconsistent with our policy, legislation and institutions, are of force and prevail.—*State v. Cawood*, 2 Stew. 360; *N. & C. R. R. Co. v. Peacock*, 25 Ala. 229; *Barlow v. Lambert*, 28 Ala. 704. We concur in the conclusions reached by the Supreme Court of Connecticut in *Johnson v. Patterson* (14 Conn. 1), *State v. Moore* (31 Conn. 479), after a careful examination, that the principle announced in *Ilott v. Wilkes* is not in harmony with our condition or our institutions, and that it had its origin in a state of society not existing here, and the necessity for protection to a species of property, not here recognized, or if recognized, of less importance and value

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than the legislation of Great Britain, and the common law there prevailing attached to it.

It is a settled principle of our law, that every one has the right to defend his person, and property, against unlawful violence, and may employ as much force as is necessary to prevent its invasion. Property would be of little value, if the owner was bound to stand with folded arms and suffer it taken by him who is bold and unscrupulous enough to seize it. But when it is said a man may rightfully use as much force as is necessary for the protection of his person and property, it must be recollected the principle is subject to this most important qualification, that he shall not, except in extreme cases inflict great bodily harm, or endanger human life.—*State v. Morgan*, 3 Ired. 186. The preservation of human life, and of limb and member from grievous harm, is of more importance to society than the protection of property. Compensation may be made for injuries to, or the destruction of property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent. It is an inflexible principle of the criminal law of this State, and we believe of all the States, as it is of the common law, that for the prevention of a bare trespass upon property, not the dwelling-house, human life can not be taken, nor grievous bodily harm inflicted. If in the defence of property, not the dwelling-house, life is taken with a deadly weapon, it is murder, though the killing may be actually necessary to prevent the trespass. The character of the weapon fixes the degree of the offence. But if the killing is not with a deadly weapon—if it is with an instrument suited rather for the purpose of alarm, or of chastisement, and there is not an intent to kill, it is manslaughter. *Carroll v. State*, 23 Ala. 28; *Harrison v. State*, 24 Ala. 21; *State v. Morgan*, 3 Ired. 186; *Commonwealth v. Drew*, 4 Mass. 391; *McDaniel v. State*, 8 Sm. & Marst. 401; *State v. Vance*, 17 Iowa, 138; Whart. Hom. §§ 414-17. However true this may be, of violence the owner directly in person inflicts, for a trespass, or in defence, or prevention of a trespass, committed in his presence, the argument now made by the counsel for the appellant is that of the court in *Ilott v. Wilkes*, that for the prevention of secret trespasses, committed in the absence of the owner, he may employ means of defence and protection to which he could not resort if present, offering personal resistance. The instructions requested, place the proposition in its most imposing form—of protection against repeated acts of aggression, committed in the

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night-time by unknown trespassers. For the prevention of such trespasses, he may, it is said, employ any agency or instrumentality adequate to the end, even though it involves, of necessity, grievous bodily harm, or death to the trespasser. The proposition itself subordinates human life, and the preservation of the body in its organized state, to the protection of property. It subjects the man to loss of limb or member, or to the deprivation of life, for a mere trespass, capable of compensation in money. How else can the owner protect himself, it is asked. The answer may well be, he is not entitled to protection, at the expense of the life, or limb, or member of the trespasser. All that the latter forfeits by the wrong, is the penalty the law pronounces. At common law, he would be compelled to compensation, for particular trespasses, and of the nature, in one respect, the defendant intended to guard against—the severance from the freehold of its products—not only is he compelled to compensation, but under our statutes, indictable for a misdemeanor. It may well be asked, in return, if the owner has the right to visit on the trespasser a higher penalty than the law would visit? Has he a right to punish a mere trespass as the law will punish the most aggravated felonies, which not only shock the moral sense, evince an abandoned, malignant, depraved spirit, but offend the whole social organization? There are but few offences the law suffers to be punished with death. Whether this extreme penalty shall be visited the law submits to the discretion and to the mercy of the jury—they may consign the offender to imprisonment for life in the penitentiary. There is no offence which is punished by the laceration of the body, or by loss of limb or member. Shall the owner, for the prevention of a trespass, inflict absolutely the penalty of death, a jury could not inflict, nor a court sanction? Inflict it without the opportunity the jury has, when they may lawfully inflict it, of lessening it in their mercy and discretion to imprisonment? Shall he, in protection of his property, lacerate the body, a punishment so revolting that it has long been excluded from our criminal code? If the owner is vexed by secret trespasses, and their repetition, his own vigilance must, within the limits of the law, find means of protection. Stronger enclosures, and a more constant watch must be resorted to, and a stricter enforcement of the remedies the law provides will furnish adequate protection. If these fail, it is within legislative competency, to adopt remedies to the exigencies and necessities of the owner.

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It is said the spring-gun, or like engine, is harmless, if of his own wrong the trespasser does not come in contact with it. Admit it, and the controlling, underlying consideration is not met. If it was conceded thereby he lost his right to recover compensation for the injury sustained, the State does not lose the right, nor is its duty lessened, to demand retribution for its broken laws, and the unlawful death, or wounding of one of its citizens. With certainty the measure of protection to property is declared, and the force which may be employed in its defence is defined. The secrecy of the trespass, nor the frequency of its repetition, does not enlarge the one or the other. Life must not be taken, nor grievous bodily harm inflicted. The trespasser is always in fault—it is his own wrong, which justifies force, to the extent it may be lawfully used, or to the extent it may be provoked and exerted. The secrecy and frequency of the trespass would not justify the owner in concealing himself, and with a deadly weapon, taking the life, or grievously wounding the trespasser, as he crept stealthily to do the wrong intended. What difference is there in his concealing his person, and weapon, and inflicting unlawful violence, and contriving and setting a mute, concealed agency or instrumentality which will inflict the same, or it may be greater violence? In each case, the intention is the same, and it is to exceed the degree of force the law allows to be exerted. In the one case, if the trespasser came not with an unlawful intent—if his trespass was merely technical—if it was a child, a madman, or an idiot, carelessly, thoughtlessly, entering and wandering on the premises, the owner would withhold all violence. Or, he could exercise a discretion, and graduate his violence to the character of the trespass. The mechanical agency, is sensitive only to the touch—it is without mercy, or discretion, its violence falls on whatever comes in contact with it. Whatever may not be done directly can not be done by circuitry and indirection. If an owner, by means of spring-guns or other mischievous engines planted on his premises, capable of causing death or of inflicting great bodily harm on ordinary trespassers, does cause death, he is guilty of criminal homicide.—Whart. Cr. Law, §§ 418, 553.

The degree of the homicide depends on the facts already stated. If the engine is of the character of a deadly weapon, the killing is murder. It could not be employed without the intent to injure, and without indifference whether the injury would be death, or great bodily harm. But if not

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deadly in its character, if it is intended only for alarm, and for inflicting slight chastisement, or mere detention of the trespasser until he shall be freed from it, there may be no offence, or at most but manslaughter. The character of the instrument, and its probable capacity for injury, may repel all presumption to do more than merely alarm, or without inflicting any corporal harm, merely to detain the trespasser, and stay him in his efforts to wrong, and if death should ensue, it would be beyond the intention of the owner, and an unforeseen, and not a natural or probable consequence of an act in itself not unlawful. For it is lawful to frighten away the trespasser, or by detaining him and staying the wrong he contemplates, to involve him in disgrace; to detect him, and to deter him from future trespasses. If the instrument is adapted only to the purposes of punishment, and it should inflict a punishment from which death ensued, the offence is manslaughter, as it would have been if the owner in person had inflicted the violence. The instructions requested by the appellant were inconsistent with these views, and were properly refused.

The instructions given by the City Court are some of them based on the theory, that if death had ensued from the wounding of the prosecutor, by the spring-gun, it would have been murder, it is a legal sequence, that the defendant is guilty of an assault with intent to murder. Others proceed on the theory that he is guilty of an assault with intent to murder, if the spring-gun was set with the specific intent to kill the prosecutor, whom he suspected as the trespasser, and against whom he bore malice, although there was also a general intent to kill whoever was the trespasser, coming in contact with it. We regard each class of instructions as erroneous.

An error pervading the first, is that a general felonious intent is made the equivalent of the specific felonious intent, which we have said is the indispensable element of the offence, with which the prisoner stands charged. A general felonious intention, by implication of law, will convert the killing of a human being into murder, though his death or injury was not within the intention of the slayer. So, also, if there is the felonious intention to kill one, and the fatal blow falls on another, causing death, it is murder. The act is referred to the felonious intent existing in the mind of the actor, and by implication of law supplies the place of malice to the person slain.—Whart. Hom. § 183; 4 Black, 261; *Bratton v. State*, 10 Humph. 103. The doctrine of an intent

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implied by law, different from the intent in fact, can have no application to the offences the statute punishes. It is excluded by the terms of the statute, which include only direct assaults on the person of the party it is averred there was the intent to murder. If in fact there was not the intent to murder him, whether there was a general felonious intent, or an intent to do harm to some other individual, is not important—there can be no conviction of the aggravated offence.—*Morgan v. State*, 13 Sm. & Mar. 242; *Jones v. State*, 11 ib. 315; *Norman v. State*, 24 Miss. 54.

An assault is defined as an intentional attempt, by violence, to do a corporal injury to another. In *Johnson v. State* (35 Ala. 363), it is defined as “an attempt or offer, to do another personal violence, without actually accomplishing it. A menace is not an assault, neither is a conditional offer of violence. There must be a present intention to strike.” In *Lawson v. State* (30 Ala. 14), it is said: “To constitute an assault, there must be the commencement of an act, which if not prevented, would produce a battery;” the drawing of a pistol, without cocking or presenting it, is not an assault. In *State v. Davis* (1 Ired. 125), it is said by GASTON, J.: “It is difficult in practice to draw the precise line which separates violence menaced, from violence begun to be executed, for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by an act, which is not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, and the battery is attempted.” Constructive assaults are not within the statute. The ulterior offence; the principal felony intended, and the intent to accomplish which, is the aggravating quality of the offence, consists in actual violence and wrong done to the person. The assault must, therefore, consist of an act begun, which if not stopped or diverted, will result, or may result in the ulterior offence, and the act when begun must be directed against the person who is to be injured.—*Evans v. State*, 1 Humph. 394; *State v. Freels*, 3 Humph. 228. It must also be an act which, when begun, the person against whom it is directed has the right to resist by force.—2 Arch. Cr. Pl. 224, 2 note.

The setting a spring-gun on his premises, by the owner, is culpable only because of the intent with which it is done. Unless the public safety is thereby endangered, it is not indictable.—*State v. Moore*, 31 Conn. 479. If dangerous to the public, it is indictable as a nuisance. Resistance by

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force to the setting of it, by any individual (if not dangerous to the public), the law would not sanction, though he may apprehend injury to him is intended, if he trespass on the premises. The injury exists only in menace—it is conditional, and his own act must intervene, and put in motion the force from which injury will proceed. While because of the unlawful intention with which the gun is set, the owner is made criminally liable for the consequences he contemplates, it is not his violence except by implication of law which produces the injury. It is not, consequently, an assault which connected with an intent to murder, is punishable under the statute. If the gun is set with the intent to kill a particular person, who is injured by it, whether it is not an attempt to murder committed by means not amounting to an assault, indictable under another clause of the statute, is a question this record does not present.

The result is that the judgment of the City Court is reversed, and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

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Indictment for Vagrancy.

1. *A lewd woman, supported by her parents, is not a vagrant.*—A minor, supported by her parents, who have an honest occupation, can not be convicted of vagrancy, although she may be a lewd woman.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The facts are contained in the opinion.

WATTS & SONS, and J. B. NETTLES, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

MANNING, J.—The indictment in this cause, charges that the defendant was “a common prostitute, or keeper of a house of prostitution, and had no honest employment whereby to maintain herself.” There was evidence that she was a lewd woman, and also evidence that, if believed by the jury, tended to show that she was a minor, and was sup-

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ported by her parents, who had an honest occupation. And the court was requested to instruct the jury, in writing, that if from the evidence they believed this to be true, they should render a verdict of not guilty: which instruction was refused.

The prosecution is founded upon section 4218 (3630) of the Code of 1876; which relates to offences in the nature of vagrancy, or to the dishonest or demoralizing practices or occupations of those who might as paupers become chargeable upon the community. The last clause in the indictment—that defendant had no honest employment whereby to maintain herself—is taken from the statute, and is an averment that must be substantiated to the satisfaction of the jury, in a prosecution under section 4218. This is intimated in the opinion in *Ex parte Birchfield*, (52 Ala. 377). The court erred in not giving the charge asked for.

Let the judgment be reversed and the cause be remanded; appellant to remain in custody until discharged according to law.

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Obtaining Goods by False Pretence.

1. *A false pretence twice repeated is not a case for election.*—Goods obtained from one person by the same false pretence, twice repeated on different days, constitutes only one transaction, and is not a case for election.

2. *All the false pretences need not be proven.*—It is not material in an indictment for this offence, to aver all the pretences made, or to prove all that is averred, if those charged and proved are intended and calculated to deceive and defraud, and on the strength of them, or any one of them, the valuable commodity or thing is obtained.

3. *Every pretence may not be false.*—The falsity of every pretence made is not always necessary to a conviction. It is enough if a material part of the pretence be false; that it be made with intent to defraud; and that it induces the person sought to be wronged to part with his property. These are inquiries for the jury, under proper instructions.

4. *An abstract charge should be refused.*—A charge based upon no evidence in the case is abstract, and is properly refused.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

The defendant was indicted for obtaining goods under false pretences, and pleaded not guilty.

The defendant went to the city of Greenville, in Butler

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county, on the 11th of October, 1877. There he sold a bale of cotton, which he had carried with him, and applied the money received for it to the payment of a mortgage debt, which he owed to Strouse & Steinhart, merchants of that city. He asked if they would sell him goods that he wanted. Steinhart replied: "If I sell you some goods, what security can you give me?" "The defendant said, 'I have got two bales of cotton out and in a house at home, and one in the field, and they are unincumbered.' To which Steinhart replied: 'Well, if that is so, I will let you have what goods you want on that.' At that time the defendant bought seventeen dollars worth of goods, and said he wanted bagging and ties to put up the cotton, but that he was too heavily loaded to carry it out then, but would return in a few days and get the bagging and ties." The defendant went back to Greenville on the 16th day of the same month, to obtain those articles, and wanted to get other goods. Steinhart testified, that, from what he had heard, he suspected Beasley did not have the cotton. "He did not tell Beasley this, but mentioned it to his clerk, who talked with him about the cotton, and Beasley said he did have two bales of cotton out, and one in the field. Whereupon, they let him have eleven dollars worth of goods, including the bagging and ties."

"The defendant then moved the court to require the solicitor to elect which of the transactions he would rely upon." The court refused to do so, and the defendant excepted.

The defendant told Boyett, on the 16th day of October, that the cotton he sold to Boyett on the 11th of October was all the cotton he had. "The proof showed that Strouse & Steinhart sent their agent to the house of defendant, four or five weeks after the representations had been made, and he found nobody at home. He saw five or six hundred pounds of seed cotton in a house; but as the father of the defendant also lived at the place, he did not know whether the cotton belonged to the defendant or to his father."

A witness introduced by the defendant testified, "that some time in the month of October he was in the defendant's field, and he judged there was about 800 or 900 pounds of cotton then in the field."

The defendant asked the following charges, which were in writing:

"4. If the representations were, that he had two bales of cotton out, and one in the field, and the charge in the indictment is that he had two bales of cotton, this would be a fatal variance, and the defendant could not be convicted.

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“5. If there is a reasonable doubt as to whether the goods obtained were over the value of twenty-five dollars—the goods proven to have been obtained by the defendant—then the defendant could not be convicted of the offence as charged in the indictment.”

The court refused to give the charges requested; and to each of such refusals, the defendant severally and separately excepted.

The jury, under the instructions of the court, rendered this verdict: “We, the jury, find the defendant guilty as charged in the indictment, and we further find the value of the goods obtained to be thirty-three dollars.”

The defendant then moved an arrest of judgment, “on the ground that the representations were made at different times and goods received on different days, making two separate and distinct transactions; that each was a misdemeanor, and not susceptible of being joined so as to make a felony, and if this is no good ground for arrest of judgment, then the defendant urges the above state of facts, on a motion for a new trial.”

The court overruled the motion, and the defendant excepted.

No counsel for the appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. No election of offences in this case could be made. The crime was one, as the transaction was one. The goods were delivered at different times, but were delivered in pursuance of the agreement induced by the false pretence made at the first interview. The repetition of the misrepresentation did not make a new transaction.—2 Bish. Cr. Law, § 356.

2. The motion in arrest of judgment, or for a new trial, was properly disallowed. If the indictment charged that the defendant falsely pretended to have two bales of cotton, and the proof shows he pretended he had three, the conviction was proper.—2 Bish. Crim. Law, § 347, and authorities cited.

4. The fourth charge requested was properly refused. The offence charged in the indictment is punishable as larceny.—Code, § 4370. It may be punished as grand or petit larceny, according to the value of the property obtained. A person indicted for grand, may be convicted of petit larceny. But the charge asked, directed the jury to acquit if they should find the property obtained to be of less value than

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twenty-five dollars. Moreover, there was no conflict of testimony as to the value of the goods, nor any that they were of less value than was averred in the indictment. The charge was abstract, and was properly refused.

The fifth charge is subject to the same objection.

STONE, J.—We find no error in this record. There are not two false pretences proved. The testimony is that the same pretence was twice repeated on different days, and that on such pretence the defendant obtained merchandise on each of the days. This is but one transaction, and not a case for election.—2 Bish. Cr. law § 356.

Neither is there any material variance between the charge in the indictment and in the proof. The charge is that he falsely pretended that he had two bales of cotton. The proof was that he said he had “two bales of cotton out, and in a house at home, and one in the field.” It might be true that he had the one bale in the field, and did not have the two bales “out and in a house.” In such case, the pretence as to the two bales would be alone false. It is not material to aver all the pretences made, or to prove all that is averred, if those charged and proved are intended and calculated to deceive and defraud, and on the strength of them, or any one of them, the valuable commodity or thing is obtained.—2 Bish. Cr. law § 347.

This case is unlike that of *O'Connor v. The State*, (30 Ala. 9). In that case a single pretence was charged, to-wit: “that he had in Macon, Georgia, the sum of seven thousand dollars.” A witness swore that the representation made by the prisoner was “that he had seven dollars less than seven thousand in the hands of a friend at Macon, Georgia.” There was a single representation, made of a single, inseparable fact, and there was proof of a single representation, and they were variant, according to the testimony of this witness. In this case a single pretence is charged and averred to be false, namely, that he had two bales of cotton. The proof was that he made a double and separable representation, namely, that he had two bales of cotton out and in a house, and one in the field. The falsity and fraudulent purpose, if proved, of either of these pretences would make that feature of the charge. The proof showed a representation of two separable facts, either one of which might constitute that element of the offence. One might be false and one true. The falsity of every pretence made is not always necessary to a conviction. If it were, every malefactor could escape conviction

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by blending some truth with his false pretences. It is enough if a material part of the pretence be false, that it be made with intent to defraud, and that it induces the person sought to be wronged to part with his money, or other valuable thing, on the strength of such representation. In this case the testimony tends to show there was a large part of a bale in the field, and that may be the reason why that part of the pretence was not charged to be false. Whether a material representation was falsely made, as of a fact; whether it was made with intent to defraud; whether in consequence of such representation, and relying on it, the owner was induced to part with the alleged thing of value, are all inquiries for the jury, under proper instructions, on the solution of which the conviction or acquittal of the accused depends. These being affirmatively proved, a conviction should follow, irrespective of other representations made, whether true or false, unless those other representations were the moving inducement to part with the valuable thing; in which case they should be charged and proved.

If the goods obtained be of value less than twenty-five dollars, this would only reduce the offence to a misdemeanor, and would not justify an acquittal.—Code of 1876, §§ 4370, 4356-7. Besides, there does not appear to have been any testimony tending to show the goods obtained were less in value than \$33, and the verdict of the jury ascertained the same value. This charge, as asked, appears to have been abstract.

Affirmed.

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Indictment for the Emission of Change Bills.

1. *The statute intended to suppress illegal currency.*—The purpose of the statute (Code of 1876, § 4433,) forbidding the emission of change-bills to circulate generally, as money, was intended to suppress the evils of an unauthorized paper currency.

2. *Every form of illegal currency is forbidden.*—The statute is not directed against paper of any particular form or character. If the purpose of its emission be, that it shall pass and circulate generally as money for an indefinite period, it falls within the statutory prohibition.

3. *Paper not transferable, is not violative of the statute.*—A paper which authorizes a person named in it to purchase goods on the credit of the drawer to a specified amount, and expresses on its face that it is not transferable, can not enter into general circulation as money, and is not within the purview of the statute.

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APPEAL from the Circuit Court of Autauga.

Tried before the Hon. JAMES Q. SMITH.

The indictment in this case was found by the grand jury of Autauga county, on the 23d day of October, 1877. It was in the following words and figures, viz: "The grand jury of said county charge that, before the finding of this indictment, John W. Durr caused, or procured to be made, written, signed, or countersigned, without authority of law, a certain paper in words and figures as follows, to-wit:

1	1	1	1	1	10	10	15	15	15	15	25	25	25	
1	OCTOBER 17, 1877.												25	
1	LET <i>Hamp DeJarnette</i> have $\frac{1}{2}$ _____												50	
1	Dollars trade at store.												50	
1	J. T. FLOYD.												50	
1	1	1	2	2	2	2	3	3	3	3	4	4	5	5

"Which said paper was caused or procured to be made, emitted, signed, or countersigned as aforesaid, for the purpose and with the intent that said paper should answer the purposes of money, or for general circulation, against the peace and dignity of the State of Alabama."

To this indictment the defendant demurred, and assigned the following causes of demurrer: *First*, "that the paper set forth in the indictment shows upon its face that it did not, and could not answer the purposes of money, or be for general circulation;" *second*, "that the indictment did not aver that the defendant made, or emitted, or caused to be signed, the paper set forth in the indictment, to answer the purposes of money;" *third*, "that the indictment does not aver that the paper set forth in the indictment was made, signed, emitted, or countersigned by the said J. T. Floyd, or any other person, or that the defendant caused said Floyd or any other person to sign, make, emit, or countersign said paper;" *fourth*, "that the causing or procuring to be made, emitted, signed, or countersigned, the paper set forth in the indictment for the purpose and with the intent that said paper should answer the purposes of money, or for general circulation, without more, is not a crime by the common law, or statutes of this State;" *fifth*, that causing the said paper to be signed, emitted, or countersigned, "for the purpose of

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general circulation, without more, is not a crime by common law, or by the statutes of this State;" *sixth*, "that the paper set forth in the indictment shows upon its face that it is payable to a particular person therein named, and that it is not transferable; and causing such a paper to be made, emitted, signed, or countersigned, is not a crime by the laws of this State;" *seventh*, that the indictment is defective on account of its repugnancy; and *eighth*, that the indictment charges no crime against the defendant."

The court overruled the demurrer, and the defendant pleaded not guilty.

On the trial, evidence was introduced by the State which showed that the Lehman Manufacturing Company, of which the defendant was a member, owned and operated a cotton factory in Autauga county, and also owned a store; and that J. T. Floyd, whose name is signed to the paper, an exact copy of which is contained in the indictment, was book-keeper of the company, and a clerk in the store. He signed the paper which is mentioned in the indictment, and testified "that the defendant did not cause or procure" him to do so.

There was evidence that the Manufacturing Company employed from one hundred to one hundred and twenty operatives; and that, for the convenience both of the officers of the company and of the operatives, the defendant deposited at the factory a large number of papers in blank, similar to that described in the indictment. This was done to avoid the necessity of entering on the books of the company every article of merchandise sold to the operatives, and for the accommodation of the employees, who wished to anticipate their wages. The papers were issued only to the operatives of the factory. The words "not transferable" were written in red ink across the face of each paper so issued. No person except the employee to whom it was given, and whose name was written in it, had ever obtained, or could get any article of merchandise from the store, or "any thing else upon the said paper."

"The witness, Floyd, further testified, that the figures on the margin of said paper, from five to fifty, represent the number of cents; and the other figures, from one to five, represent dollars. When the person to whom said paper was given purchased any goods or merchandise, the numbers in the margin corresponding to the price were punched, and the paper handed back to such person, and when goods and merchandise had been purchased to the amount stated in said

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paper, the paper was taken up and destroyed. The wages of the employees were payable monthly, and at the end of the month the balance of said wages was paid in money; and that said papers had never been issued to pay wages which were due; and none had ever been given or issued to any person unless he was an employee of the factory." This testimony was corroborated by other witnesses.

"The solicitor offered, on behalf of the State, to read in evidence to the jury, the said paper thus presented to said witness, but the defendant objected to its introduction, on the grounds: *First*, that there was no sufficient evidence that the defendant caused or procured said paper to be made, emitted, signed, or countersigned; *second*, that the said paper is not of the kind or character prohibited by the statute; *third*, that the defendant was authorized by law to cause or procure said paper to be made, emitted, signed, or countersigned." The court overruled the objection, and permitted the said paper to be read in evidence to the jury; to which action the defendant excepted.

The defendant introduced the superintendent of the factory, who testified that he suggested to the defendant the preparation and use of the tickets or papers described in the indictment, and that the defendant objected, because he said it would violate the law. But to this testimony the solicitor objected. The court sustained the objection, and the defendant excepted.

The defendant introduced a witness who had been a practising lawyer for more than twenty years, and offered to prove that he had submitted the said papers to him in blank; and that the defendant said "his purpose was to save time and trouble, and to accommodate the operatives, as many of them were compelled to anticipate their wages; but in doing so, he did not wish to violate the law, and asked the advice and opinion of said attorney." To this evidence the State objected, and the court sustained the objection, and the defendant excepted.

Among other charges, the defendant asked the following instruction, in writing: "That a paper which is made, emitted, signed, or countersigned, for the purpose or with the intent that no other person shall use said paper in any way whatever, than the person to whom said paper was made payable, and to effect this purpose the paper is made not transferable, then said paper is not made, emitted, signed, or countersigned, for the purpose or with the intent to answer the purposes of money, or for general circulation; and if the

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jury believe from the evidence that the defendant caused or procured the paper read in evidence, for the purpose, and with the intent that said paper should be alone used by the person to whom it was made payable, and by no other person, and for no other purpose, and with no other intent, then the jury must acquit the defendant." The court refused to give the charge, and the defendant excepted.

CLOPTON, HERBERT & CHAMBERS, for the appellant.

JOHN W. A. SANFORD, Attorney-General, for the State.

BRICKELL, C. J.—The indictment is founded on the statute (Code of 1876, § 4433), which prohibits the making, emission, &c., without authority of law, of any paper to answer the purposes of money, or for general circulation. The original statute, from which this section of the Code was taken, was enacted as part of the Penal Code of 1841. Clay's Dig. 435-6. But a short time prior to its enactment, the Supreme Court of the United States had decided, and the decision had been followed by this court, that banking in this State, in all its ramifications, was a common law right belonging to the citizen, unrestrained by the constitution or existing laws.—*Bank of Augusta v. Earle*, 13 Peters, 519; *Nance v. Hemphill*, 1 Ala. 551. The statute was intended to serve a two-fold purpose—that of restraining individuals from exercising the function of banking, which consists in the issue of paper to answer the purposes or to circulate as money—and to suppress the mischiefs of an unauthorized paper currency passing by delivery as money. Such a currency, especially of low denominations, in times of financial distress, when the authorized or chartered banks had suspended specie payments, and the smaller coins were withdrawn from circulation, had been introduced, and the community often suffered from the irresponsibility of those by whom it was issued. This currency was of various forms and characteristics. Sometimes bearing all the appearances of a bank-note, yet payable only in bank-notes, and redeemable only when a sufficient number of the notes to amount to a particular sum were presented. Sometimes payable to bearer, or to a particular person or bearer, and sometimes without a payee. It also often assumed the form of a ticket declaring that it was good for a particular sum in merchandise. If the statute had been directed against paper of a particular form, paper in the nature of bank-notes, it would

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not have been adapted to the suppression of the evils from which the community had suffered. It is not therefore directed against paper of any particular form or character. Without regard to its form or character, if the purpose of its emission is that it shall pass and circulate as money—in the language of the statute, *answer the purposes of money*—it falls within the statutory prohibition.—*Barnett v. State*, 54 Ala. 579. When we say answer the purposes of money, we mean the purposes for which bank-notes are issued; that of entering into the transactions of business, and passing current as money for an indefinite period. Such we regard is the real meaning of the statute. Bills of exchange, promissory notes, bills single, checks, bonds, all answer some of the purposes of money. They are given and accepted in the payment of debts, in the purchase of property, and serve many of the purposes of money; yet they do not fall within the prohibition of the statute, unless intended for general circulation—intended not to answer the purposes of money with a particular individual, in a particular transaction—but to pass current as money in all the general transactions in which money may be used. It is only when they are so intended, and so used, that they are capable of working the mischief to the community against which the statute intends to guard.

The paper now in question, in form and legal effect, is a mere authority personal to the individual named in it to purchase goods on the credit of the drawer, to the amount of fifty cents. The negotiability of the paper is destroyed by the words, *not transferable*, written across its face, if in any event it was negotiable. These words prevent its transfer, or the delegation of the authority it contains. Such a paper can not do the office of money—can not enter into general circulation; can not pass by delivery; can not be changed or converted from a mere authority personal to the individual named in it, and is not within the purview of the statute. The demurrer to the indictment should have been sustained. This conclusion renders it unnecessary to consider any other question presented by the record.

The judgment is reversed, and a judgment will be here entered discharging the appellant from further prosecution.

[Morningstar v. The State.]

Morningstar v. The State.

Larceny of Timber.

1. *A question relative to possession of land may be asked.*—On the trial of a person indicted for larceny of timber, the question, “who was in possession of the land on which the stick of timber grew,” was proper, because it was an inquiry concerning a fact, and not a legal conclusion.

2. *A license may be granted by parol.*—For the purpose of showing, in such a case, that the accused did not take and carry away the timber, *animo furandi*, it is not necessary that the defendant should show a deed of conveyance. A purchase by parol from a person who owned the land, or was believed by him to be the owner of it, would be sufficient. Such a sale, while acknowledged by the party making it, might operate at least as a license to take the tree if it belonged to the vendor.

3. *A witness may be recalled.*—It is within the discretion of the court to have a witness recalled and further cross-examined, after he has been discharged from the witness stand.

APPEAL from the Circuit Court of Escambia.

Tried before the Hon. JOHN K. HENRY.

The defendant was indicted at the spring term, 1876, of the Circuit Court of Escambia county, for feloniously taking and carrying away “one stick of square-hewn pine timber, the personal property of Mrs. Nancy George.”

On the trial, a witness introduced by the State was asked, “Who was in possession of the land on which the stick of timber grew?” The defendant objected to the question; the court overruled the objection, and the defendant excepted. The witness then testified that he was the agent of Mrs. George, who owned the land on which the timber grew, and that the defendant approached him and “tried to purchase the trees, but that he declined to sell them to him at any price.” Afterwards, the defendant had the tree cut down and carried away. He saw the “defendant when he was having the timber hauled off, who told him (the witness) to say nothing about it, and he would make it all right.” The witness, on cross-examination, said that he had had in his possession a deed executed by himself to Mrs. George, conveying “the land in question,” but that at a former trial of this case he gave it to a lawyer employed in the prosecution, and since that time had not seen it. The clerk of the court testified that he had searched his office thoroughly, but had not found it. Other lawyers engaged in the prosecution tes-

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tified they had made diligent search for the deed, but without success. Upon this proof of loss of the instrument, the State offered to prove its contents. To this action the defendant objected; the court overruled the objection, and the defendant excepted.

The bill of exceptions states: "One of the defences relied upon by the defendant was that Morningstar purchased said stick of timber from one Mrs. Jordan and her two sons; and, among other witnesses, put one Joe Spellman on the stand, who testified that he was present when the defendant and Mrs. Jordan made a trade about some timber, and that one of Mrs. Jordan's sons went with the defendant, and in his presence pointed out the identical tree in controversy, as one of the trees that he had purchased. A man by the name of Aiken was present at the time." The State cross-examined Spellman and let him go.

The defendant proceeded with his testimony, and, among other things, offered the following affidavit, which had been admitted by the State, subject to legal objection:

["Exhibit A."]

"The defendant expects, if John Aiken was present, he would swear that he knew the tree from which the stick of timber in question was manufactured; that he was present when Mrs. Jordan, and her two sons, Elijah and Guege, sold the defendant, Morningstar, some land, and that they pointed out said tree, in his presence, as being on the land sold.

"H. MORNINGSTAR."

This was sworn to and subscribed by the defendant on 28th day of March, 1878.

The State objected to that part of this affidavit beginning with the words, "that he was present when Mrs. Jordan," &c., and ending "on the land sold," on the ground that the sale of land could not be proven by parol testimony. The defendant then examined one Kelley, who testified he was present and saw the defendant pay Mrs. Jordan one hundred dollars in money for some land which lay in the neighborhood of the land upon which the tree in controversy grew." The court sustained the objection, and the defendant excepted.

After the defendant had closed his evidence, the State recalled Joe Spellman, who had been examined and cross-examined, and asked him this question: "Did you ever hear the defendant, Morningstar, say anything about that big tree that you cut for him, and if so, what?" The defendant

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objected to this, because it was not in rebuttal. The court overruled the objection, and the defendant excepted.

As there was no objection to the testimony of the witness, and no charge was based upon it, it is unnecessary to set it out.

J. M. WHITEHEAD, for the appellant.—1. Possession is a technical legal phrase, and is essentially a legal conclusion (*Bonvier Dic.*), and cannot be testified to by a witness. The facts should be stated, and the jury should ascertain the possession, under the instructions of the court.

2. The record of the deed should not have been admitted, because the original was shown to have last been in the possession of one of the lawyers in the case who was not sworn. It was not necessarily in his office. There was no presumption that it was.

3. The exclusion of the showing of the witness, Aiken, was wrong. Anything that would tend to show a want of the *animo furandi* would be competent. A verbal permission of any kind would be good for this purpose. If he made a contract of purchase, and the tree was pointed out to him as a part of the purchase, and he took, *bona fide*, under claim of right, this would be a complete defence. The testimony excluded was a step in that direction, and should have been admitted.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The witness, Jernigan, was the agent of Mrs. Groves, and as such had possession of the land. This is a fact which may be proven by parol testimony.—17 Ala. 602-7; *Ib.* 428-9; 1 Ala. 348.

2. The court did not err in its exclusion of the conversation with defendant before McMillan's store. It was no part of the conversation which occurred when the defendant hauled the log away; nor was it a part of the conversation elicited by the State. The supposed interview took place at a different time, and the accused could not properly introduce his own declarations to change a detected larceny into the appearance of a purchase.—Roscoe Cr. Ev. 89, Hanson's case in the note; 1 Brick. Dig. 834; Par. 424.

3. The court properly admitted the record of the lost deed in evidence. The court must judge when the predicate for the introduction of secondary evidence has been established. It belongs to the same class of duties or powers which obliges the court to decide whether or not the confessions of a prisoner are competent evidence. Unless the court *grossly* errs,

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its action relative to such matters will not be reversed (53 Ala. 29-33; 55 Ala. 47), and secondary evidence of lost instruments can always be given.—5 Ala. 439; 6 Ala. 589; 29 Ala. 457.

4. The evidence relative to the sale of the land to the prisoner was properly rejected. If the sale was made, he had the deed of conveyance, and title to real estate cannot be proven by parol testimony.—27 Ala. 281.

5. The examination of witnesses is under the control of the court, and must necessarily be left to its discretion. The court did not err in permitting the re-examination of Spellman.—52 Ala. 182; 50 Ala. 164.

MANNING, J.—The question, “who was in possession of the land on which the stick of timber grew,” &c., was in this case, an inquiry concerning a fact, and not a legal conclusion: and the objection to it was properly overruled.

The interrogatory on behalf of defendant to witness, Jernigan, which was ruled out about a conversation between defendant and him, at McMillan’s store, was illegal and irrelevant; and no explanation having been made of any intention to introduce other evidence by which that conversation might be made admissible, the court did not err in excluding it.

The evidence of the loss of the original deed of Jernigan to Mrs. George, was sufficient to justify the admission of a duly certified copy of it from the books in the Probate Court office, where, after due proof or acknowledgment of its execution, it had been recorded according to law.—*Mordecai v. Beal*, 8 Por. 535.

It having been shown by the State that defendant had applied to Jernigan, the agent of Mrs. George, for the purchase from him of the timber-tree in question—which had been refused—and that he afterwards cut it and hauled it away, he was allowed to prove by one Spelman, that “defendant and Mrs. Jordan made a *trade about some timber* and that one of Mrs. Jordan’s sons went with the defendant and in his presence pointed out the identical tree in controversy, as one of the trees that he had purchased,” and that a man by the name of Aiken was present at this time. This was proper. A parol license to take the trees might be proved. Afterwards defendant proposed to prove by Aiken “that he was present when Mrs. Jordan and her two sons sold the defendant, Morningstar, some land, and that they pointed out said tree in his presence as on the land sold;”

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which was objected to, and excluded on the ground that the sale of land could not be proved by parol testimony.

For the purpose of explaining that he did not cut the tree and take away the valuable spar, or stick of timber obtained from it, *animo furandi*, the defendant was entitled to prove such facts as tended to establish this defence; and it was not necessary to this end that he should show a deed of the land, or a paper title, if he did not have any, to prove sale of the land to him. A purchase by parol from a person who owned it, or was believed by him to be the owner of it—if the seller acknowledged himself or herself bound thereby, would, in a case of this sort, be sufficient. Such a sale while acknowledged by the party making it, might operate at least as a license to take the tree, if it belonged to such party. What credit was due to the story thus proved, it would have been for the jury to determine. And if defendant had a conveyance of the land, and it was necessary to show what particular land he acquired thereby, the conveyance as the best evidence thereof, would have had to be produced and proved by him.—*Morton v. The State*, 30 Ala. 528; *Mordecai v. Beal*, 8 Por. 535; *Blakey v. Blakey*, 9 Ala. 391. The circuit judge erred in excluding the evidence in question.

It is within the discretion the law allows to a circuit judge, to have a witness for defendant called back and further cross-examined on behalf of the State, after he has been discharged from the witness stand.

Let the judgment of the Circuit Court be reversed, and the cause be remanded.

Defendant will remain in custody till discharged by due course of law.

Martin v. The State.

Indictment for Selling Liquor without License.

1. *Retailing is one offence; engaging in the business of retailing another.* Our statutes carefully distinguish between the two offences of retailing spirituous liquors without license, and engaging in the business of retailing without license under the revenue law. Under the former, a single act constitutes the offence; under the latter, the accused must *engage in the business* of retailing, before a conviction would be lawful.

2. *Agency of unlicensed corporation is no defence.*—It is no defence to an indictment for retailing liquor without license, that the accused acted merely as the agent of a corporation, unless it had been properly licensed.

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3. *It is no defence that corporation sold liquor only to its members.*—Nor is it a defence that the accused was merely the agent of a corporation which owned the liquor and the bar where it was sold; that no one but members or stockholders, or persons specially invited, could gain admission to the room; and that liquor was sold to none but members, and the money paid went into the treasury of the corporation.

4. *Such a sale is indictable.*—By such a sale, the absolute property in the liquor which belonged to the corporation is transferred for a valuable consideration to another person, and such sale without a license is an indictable offence.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The defendant was indicted for retailing liquor without license. He was employed as an agent or employee of the Standard Club, which was organized in the city of Montgomery, and incorporated under the general laws of the State, for literary and social purposes. It was governed by a constitution and by-laws, and occupied three rooms in the second and third stories of a building in the city of Montgomery. According to its laws, only the members, or persons specially invited, could enter the premises of the club, or be present at its meetings. A record of the visitors was kept, and nobody residing in the city could be admitted upon invitation more than once.

Persons could pass readily from one room of the club to another. In the second story of the building, one of its rooms was used as a bar-room, in which "spirituous liquors, that had been purchased with the funds of the club, were sold only to the members of the club." The money paid for liquor was deposited in the common fund, and was spent only to replenish the stock of liquors for the use of the club. No visitor, or person not a member of the club, was permitted to buy or pay for liquor at its bar-room. The liquor was sold as above stated in quantities less than a quart, and was drank upon the premises.

The court charged the jury, "That the incorporation, the constitution nor by-laws of the Standard Club, nor any thing in its association, conferred upon said association the right to retail or sell spirituous or vinous liquors in less quantities than a quart, without first obtaining a license.

2. "That the spirituous or vinous liquors purchased with the funds of the incorporated association, and then kept in a room for retail to the members of the association, that each sale so made to a member was a sale of an incorporated association to one of the individual incorporators; and this would be a sale in contemplation of section 3618 of the Revised Code, and if carried on without having obtained a license therefor, would be a violation of said section.

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3. "If the jury are satisfied, beyond a reasonable doubt, from the evidence, that the defendant, in the county of Montgomery, and within twelve months before the finding of the indictment, sold spirituous or vinous liquors in less quantities than a quart to members of the Standard Club, without having obtained any license therefor, he is guilty as charged in the indictment; and this would be so, although he may not have sold to any other person except to members of the club."

To each of these charges the defendant separately excepted.

RICE, JONES & WILEY, and CLOPTON, HERBERT & CHAMBERS, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—The present indictment was found and tried in July, 1877, under section 3618 of the Revised Code. The indictment is in the exact language of form 30 of that Code for retailing spirituous liquors without license, and is good and sufficient under that statute.

Our statutes have carefully discriminated between the two offences—one for "retailing spirituous liquors without license," under section 3618, and the other under the clause of the revenue law which forbids the "engaging in the business" of retailing without a license. Under the one, a conviction may be had for a single offence. Under the other, it is held that the accused, to be guilty, must engage in the business of retailing. "The term business, as here used, is the synonym of employment, signifying that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit."—See *Mulvey v. The State*, 43 Ala. 316; *Lillensteine v. The State*, 46 Ala. 498; *Campbell v. The State*, 46 Ala. 116; *Hafter v. The State*, 51 Ala. 37; *Weil v. The State*, 52 Ala. 19.

In the present case, the sale, if it be a sale, was made by the agent of a corporation to one or more of the stockholders, or members. In such case, if it was an offence in the corporation to sell, it was an indictable offence in the agent by whom the act was done. An agent can not justify an act prohibited by law, by showing he was only carrying out the will of a principal, unless that principal had authority to do the act complained of.—*Winter v. The State*, 30 Ala. 22.

A sale may be defined to be a transfer of ownership from one person to another, upon a valuable consideration paid or

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promised. In Benjamin on Sales, § 1, it is said: "To constitute a valid sale, there must be a concurrence of the following elements, viz: *First*, parties competent to contract; *second*, mutual assent; *third*, a thing, the absolute or general property in which is transferred from the seller to the buyer; *fourth*, a price in money paid or promised. . . . The third essential is, that there should be a transfer of the absolute or general property in the thing sold." Whenever the ownership is changed, this essential of the contract is complied with.

In the present case, there can be no question that the ownership was changed. The spirituous or vinous liquors were the property of the corporation. By the sale they became the property of an individual, for a valuable consideration paid by the individual member to the corporation aggregate.

The ruling of the City Court was free from error, and its judgment is affirmed.

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Indictment for Larceny.

1. *The christian name of the owner must be stated.*—An indictment which does not contain the christian name of the owner of the property stolen, or does not aver that it is to the grand jury unknown, is defective.

2. *A confession alone will not sustain conviction.*—An extra-judicial confession not corroborated by independent evidence of the *corpus delicti*, will not support a conviction for a felony.

3. *A confession must be shown to be voluntary.*—An extra-judicial confession can not be received against the prisoner unless it is shown to be *voluntary*, and this must be determined by the court.

4. *A confession is shown to be voluntary by answers to certain questions.* Whether or not a confession was voluntary, is usually shown by negative answers to questions inquiring if the prisoner had been told it would be better for him to confess, or worse for him if he did not, and the like; but a better test is a fair consideration of the age, condition, situation and character of the prisoner, and all the circumstances attending the confession.

5. *A voluntary confession may be admitted without questions.*—If the confession thus tested is shown to be voluntary, it is not error to admit it, although the preliminary questions, respecting the threats or promises made, may not have been asked.

6. *Hearsay as to ownership of property inadmissible.*—The evidence of a third person that a prosecutor identified the money found on the prisoner as that which had been stolen from her, is mere hearsay, and not admissible against the prisoner; and the absence of the prosecutor from the State at the time of the trial will not render such evidence legal.

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APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The grand jury of Montgomery county, at the February term, 1878, of the City Court of Montgomery, presented this indictment:

"The State of Alabama, Montgomery county. The grand jury of the said county charge, that before the finding of this indictment, Henry Johnson feloniously took and carried away sundry United States treasury notes, greenbacks or national bank notes, the number and denomination of which are to the grand jury unknown, of the aggregate value of thirty dollars, and the personal property of Miss McParthan, against the peace and dignity of the State of Alabama."

To this indictment the defendant pleaded "not guilty."

On the trial of the case, it was proven that Miss McParthan told a policeman that some one had stolen from her about twenty-seven dollars. He immediately arrested the prisoner, and found on his person the sum of twenty-six dollars and eighty-five cents. The policeman testified that the prisoner voluntarily confessed that he had stolen the money from Miss McParthan, and narrated all the circumstances of the theft. To all this testimony the defendant objected, but his objection being overruled by the court, he excepted. The policeman also testified "that he carried the money to Miss McParthan, and that she identified the same as her property which had been stolen." To this evidence the defendant objected, but his objection was not sustained, and he excepted.

Another officer of the police corroborated the evidence of the first witness, and said "that no inducements were offered or used to procure the confession, and that the same was freely and voluntarily made." It also appeared that, at the time of the trial, Miss McParthan had left the State.

The court then charged the jury, "that they could look at all the facts and circumstances, including the confession of the defendant and the identification of the money by Miss McParthan as testified to by the policeman, to ascertain whether the offence was committed, and that if they were satisfied, beyond a reasonable doubt, from the evidence, that the defendant, within the county of Montgomery, and before the finding of the indictment, feloniously took and carried away the money described in the indictment, and that it was the property of Miss McParthan, the person alleged to be the owner thereof, then they were authorized to find him guilty, as charged in the indictment." To this

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charge the defendant excepted, and asked the following charge in writing: "Unless the *corpus delicti* of the offence charged is shown by other evidence than the confessions of the defendant, the jury should find him not guilty." The court refused to give the charge, and the defendant excepted.

B. C. TARVER and JOHN GINDRAT WINTER, for the appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

BRICKELL, C. J.—1. The indictment fails to aver the christian name of the owner of the money charged to have been stolen, and there is no averment that such name is unknown, excusing the omission.—*Morningstar v. The State*, 52 Ala. 405. The defect compels a reversal of the judgment.

2. The extra-judicial confession of a prisoner cannot be received in evidence against him, unless it is shown to have been *voluntary*—free from the influence of hope or fear, applied to the prisoner's mind by a third person.—1 Green. Ev. § 219; *Miller v. State*, 40 Ala. 54. Whether it was made voluntarily, is a question for the consideration and determination of the court, and is usually shown by negative answers to such questions, as whether the prisoner had been told it would be better for him to confess, or worse for him if he did not; or whether similar language had been addressed to him. The better test is a fair and just consideration of the age, condition, situation and character of the prisoner, and all the circumstances attending the confession. These may satisfy the mind, although the usual preliminary questions are answered in the negative; that the confession was not voluntary, but sprang from the flattery of hope, or the torture of fear unduly excited. Or, though these questions may not be answered negatively, the circumstances attending the confession, connected with the character of the prisoner, may clearly indicate that it was spontaneous, and not affected by hope or fear springing from the words or conduct of others.

Though the court did not, before receiving the confessions of the prisoner, propound the usual preliminary questions to the witnesses proving them, we think, under the facts shown, and in the absence of all evidence inducing a contrary opinion, the court was justified in considering the confessions as voluntary. The witnesses relate all that occurred at the time, and one of them states that no inducements were held

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out to the prisoner. The prisoner was under arrest ; money corresponding very nearly in amount to the amount charged to have been stolen is found on his person, and he admits it to have been stolen from the person who is said to have lost the money, without being informed that he was charged with a theft from her ; and he proceeds to state the circumstances of the theft. The circumstances indicate as clearly that the confession was voluntary as negative answers to the usual preliminary questions would have indicated, and the City Court was not in error in permitting the confession to go to the jury.

3. The court erred, however, in receiving evidence that Miss McParthan, after the arrest of the prisoner, identified the money found on the prisoner as hers, and as the money which had been stolen from her. She was a competent witness, and ought to have been produced to prove these facts. Her verbal declarations, made in the absence of the prisoner, were mere hearsay, and not competent evidence ; nor did the fact of her absence from the State at the time of the trial relieve them of the character of hearsay and render them admissible.

4. In *Mathews v. State*, last term, we held, that an extrajudicial confession, not corroborated by independent evidence of the *corpus delicti*, would not support a conviction for felony. The City Court erred therefore in refusing the charge requested by the prisoner.

For the errors we have noticed, the judgment must be reversed and the cause remanded ; but the prisoner will remain in custody until discharged by due course of law.

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Indictment for Arson.

1. *When demurrer is not in the record it is presumed to be to the whole indictment.*—When the judgment-entry recites that defendant demurred to the indictment, but the demurrer is not contained in the record, the appellate court will presume it was interposed to the whole indictment ; and if it embraces several counts, one of which is good, a refusal to sustain the demurrer is not error.

2. *A conviction by the mayor of a town does not infamize the convict.*—A conviction before the mayor, or other officer of a municipal corporation, of the violation of a municipal ordinance against stealing, obtaining goods by

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false pretences or by violence, does not render the person incompetent to testify on the ground of infamy.

3. *Indictment for arson in the third degree.*—The count of an indictment which charges that the defendant “wilfully set fire to or burned a cotton house of R. H., within the curtilage of the dwelling-house of the said R. H., by the burning whereof the said dwelling-house was burned,” charges the crime of arson, not in the second, but in the third degree, as defined by section 4348 of the Code of 1876.

APPEAL from the Circuit Court of Butler.

Tried before the Hon JOHN K. HENRY.

The defendant was indicted on the 29th day of November, 1876. The indictment is in these words:

“The State of Alabama, Butler County. The grand jury of the said county charge that, before the finding of this indictment, Melissa Cheatham wilfully set fire to or burned a cotton-house of Robert Haygood, within the curtilage of the dwelling-house of the said Robert Haygood, by the burning whereof the said dwelling-house was also burned.

“And the grand jury of the said county further charge that, before the finding of this indictment, Melissa Cheatham wilfully set fire to or burned a cotton-house of Robert Haygood.

“And the grand jury of the said county further charge, that, before the finding of this indictment, Melissa Cheatham wilfully set fire to, or burned an inhabited dwelling-house of Robert Haygood, against the peace and dignity of the State of Alabama.”

To this indictment the defendant demurred. The demurrer was overruled, and the defendant pleaded “not guilty.” On the trial of the case, the solicitor called Robert Haygood and Granville Sims as witnesses for the State; but the defendant objected to their introduction, on the ground of infamy. In support of the objection, he introduced as evidence an ordinance of the town of Georgiana, in Butler county, which punished larceny, “obtaining goods, or any article of value, by false pretence, fraud or violence;” and also a judgment of the municipal court of Georgiana, against the said Robert Haygood, for the violation of this ordinance. The defendant then proposed to prove, by oral testimony, the nature of the offence mentioned in the ordinance, of which the witness had been convicted. But the court excluded such evidence, and the defendant excepted.

The defendant, in support of the objection against the introduction of the said Sims as a witness, offered in evidence the same municipal ordinance, and a judgment and sentence of the municipal court of the town of Georgiana against

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Granville Sims, for "obtaining property by false pretences." The court disallowed the objection of the defendant, and permitted the said Sims to testify. To this action of the court the defendant excepted. The defendant then offered to introduce the ordinance of the town of Georgiana, and minutes of the municipal court, "to go only to the credit of the said witness, Granville Sims," but the court refused the motion, and the defendant excepted.

The jury retired, and rendered the following verdict: "We, the jury, find the defendant guilty as charged in the first count of the indictment; we also recommend the defendant to the clemency of the court. June 7, 1877." And thereupon the court sentenced the defendant to be confined in the penitentiary, "at hard labor, as the statute requires, for the full period of five years."

P. O. HARPER and WATTS & SONS, for the appellant. 1. The defendant was indicted for the crime of arson in the second degree; but the first count of the indictment is defective, because it does not aver that the cotton-house was of the value of five hundred dollars.—Code of 1876, § 4347.

If the indictment charges the defendant under the second part of section 4347, it is defective, because it charges the defendant with burning a cotton-house, and fails to charge, as required by statute, that the cotton-house contained cotton; furthermore, a cotton-house is not a building mentioned in section 4347, which it is a crime to burn because it is within the curtilage of the dwelling-house. The indictment is defective in either point of view, and the demurrer should have been sustained.

2. The objections to the competency of the witnesses, Haygood and Sims, were well taken. The evidence showed that Haygood had been convicted of a violation of a town ordinance, which punished stealing, obtaining goods by false pretence, and by violence. All of them involved moral turpitude; but the court would not permit it to be shown of which offence the witness had been convicted.

The witness, Sims, had been convicted under the same ordinance of obtaining goods by false pretences. If the evidence of such conviction did not render him incompetent to testify, it should have been admitted to show what *credence* should be given to his statements. The court, therefore, erred in excluding the evidence.

3. The exposition of the law in *Lodano v. The State* (25 Ala. 64), is correct, but the indictment fails to follow the

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language of the statute. It is defective because it charges that the defendant burned the cotton-house, but does not aver its value ; nor does it aver that it contained cotton.. It is not an offence to burn a cotton-house merely, but to burn a cotton house containing cotton.

5. The third count of the indictment is defective, because it charges the defendant burned an inhabited dwelling-house, but does not *allege there was no human being therein at the time*. That no one was in the inhabited dwelling-house at the time it was burned, is the gist of the offence attempted to be charged in this count.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The indictment charges the accused with the crime of arson in the second degree, and contains the elements of the offence as defined by the Code of 1876, § 4347. This is sufficient. *Lodano v. The State*, 25 Ala. 64. The demurrer was therefore properly overruled.

2. The crimes which, under the common law, render persons incompetent to testify, are felonies and every kind of the *crimen falsi*. But, before such a disability is incurred, a conviction on an indictment before a competent tribunal, followed by a judgment, is required to be proven.—*Roscoe Cr. Ev.* 135, *et seq.* The parties objected to as witnesses in this case were never indicted, convicted and sentenced to punishment by any tribunal known to the common law, or in any of the courts of the State. Therefore, the court, refusing to sustain the objection, did not err.

MANNING, J.—The demurrer in this cause seems to have been *ore tenus*. None in writing is set out in the record. The judgment-entry recites: "The defendant interposes a demurrer to the indictment in this cause; which demurrer, being argued by counsel and understood by the court," was overruled. We must infer that the objection thus made was to the whole indictment, which consists of three several counts, the last of which is in the language of the form for arson in the second degree prescribed by the Code, and must therefore be held to be sufficient.

In regard to the objection to two of the State's witnesses, that they were infamous, and therefore incompetent, the general rule of the common law was, that such disqualification to testify as a witness was produced only by a conviction and judgment for treason, felony, or some one of the offences belonging to the class generally described as *crimen falsi*; and what these are, it is not easy in all cases to determine.

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But the conviction and judgment spoken of must be in a State tribunal, for a violation of a State law, and not merely, as in this instance, for the violation of a town ordinance, and before a mayor or councilman of the town. The disqualification is established, not by the commission of the crime, or by the verdict merely of the jury against the proposed witness, but by the judgment of the court thereupon. And a pardon of the convict would restore his competency to testify. But the pardon having this effect is that of the chief executive magistrate of the State; and his pardons are of offences only against the laws of the State. The Circuit Court, therefore, did not err in overruling the objections to the competency of the witnesses for the State in this cause.

But the jury, by their verdict, found the defendant guilty as charged in the first count only of the indictment; and it was for the offence so charged that the sentence sending her to the penitentiary was pronounced. We have then to inquire, whether this sentence is authorized by law for the offence described in that count. The accusation is, that "defendant wilfully set fire to or burned a cotton-house of Robert Haygood, within the curtilage of the dwelling-house of the said Robert Haygood, by the burning whereof the said dwelling-house was burned."

This is not arson in the first degree, according to section 4346 of the Code of 1876; because it is not alleged that it was done in the night-time, or that there was at the time any human being in the dwelling-house. It is not arson in the second degree, as described in the latter part of section 4347, because it is not alleged in this first count, that the building was an inhabited dwelling-house. Is it the offence described in the preceding part of the same section?

That is divided into three clauses separated by semi-colons, and followed by two more, which are separated from each other by a comma only, and is as follows: "Any person who wilfully sets fire to or burns any church, meeting-house, court-house, town-house, college, academy, jail, or other building erected for public use; or any banking-house, warehouse, cotton-house, gin-house, store, manufactory, or mill, *which with the property therein contained is of the value of five hundred dollars or more*; or any car, train of cars, car-shed, cotton-house, or cotton-pen containing cotton, or corn-pen containing corn; or any barn, stable, shop, or office, of another person, within the curtilage of any dwelling-house, or other building, by the burning whereof any building hereinbefore specified in this section, is burned," &c.

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The fourth of these clauses makes it arson in the second degree to burn or set fire to "any barn, stable, shop, or office of another person, within the curtilage of a dwelling-house;" and the fifth, immediately following, makes it a like offence to set fire to or burn "any other building, by the burning whereof, any building hereinbefore specified in this section is burned;" that is, any building previously specified, the burning of which was thereby made arson in the second degree. Now, nowhere before in that section was the burning of a dwelling-house declared to be that crime. The word dwelling-house is previously used therein, only to designate the curtilage appertaining to it, which protects any barn, stable, shop or office therein; the act making it arson in the second degree to burn any of them so situated.

It is evident that the indictment in this cause was drawn under the erroneous idea that the fourth and fifth clauses of section 4347, separated only by a comma, constituted but one. The consequence is, that the first count does not charge any offence described in the section. It does not allege that the cotton-house to which fire was set was, "with the property therein contained, of the value of five hundred dollars," according to one clause, or describe it as "containing cotton," according to another. Nor is the structure, although alleged to be within the curtilage of a dwelling-house, a "barn, stable, shop, or office," so situated.

The offence of the defendant was probably correctly set forth in the third count of the indictment; but as she was found guilty only as charged in the first, (which is equivalent to an acquittal on the other two,) the verdict did not authorize the judgment pronounced by the court. It must, therefore, be vacated and set aside. But, although the first count is not sufficient to charge, as it was evidently intended it should, arson in the second degree, it is good as an indictment for arson in the third degree. It charges the wilful burning or setting fire to a cotton-house, the property of another, and that is arson in the third degree, according to section 4348 of the Code of 1876. See, also, *Brown v. State*, 52 Ala. 345.

Let the cause be remanded, that the judge may pronounce sentence for the offence of arson in the third degree—and the prisoner remain in custody until discharged by due course of law.

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Merritt v. The State.

Selling Sewing Machines without License.

1. *Indictment must charge want of license.*—An indictment for selling sewing machines without license, must charge that the accused did engage in, or carry on the business of selling, and did sell sewing machines without first having paid for, and obtained a license therefor; and that at the time he did engage in, or carry on the business of selling sewing machines, he was either a member of the sewing machine company, or its agent.

2. *The jury must ascertain whether the business was carried on.*—Whether or not the sale of two or three sewing machines is sufficient to warrant a conviction for engaging in, or carrying on such a business, is a question for the jury.

3. *Judgment-entry must show action of the court on demurrer.*—A demurrer to an indictment will not be considered by the appellate tribunal, when the action of the inferior court upon it is not shown in the judgment-entry.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. JAMES Q. SMITH.

The grand jury of Autauga county, at the fall term, 1877, of its Circuit Court, presented this indictment:

“The State of Alabama, Autauga county. The grand jury of the said county charge that before the finding of this indictment, one Merritt, whose christian name to the grand jury is unknown, did engage in, or carry on the business of selling sewing machines after the fifteenth day of January, 1877, for carrying on of which said business a license was, and is by law required to be taken out, without first having paid for and taken out such license, against the peace and dignity of the State of Alabama.”

The defendant demurred to the indictment, and assigned the following causes of demurrer: “*First*, the indictment does not allege that the defendant was either a sewing machine company, or the agent of a sewing machine company. *Second*, the indictment does not sufficiently inform the defendant as to the want of which of the two licenses required of sewing machine companies, he is charged. *Third*, the indictment does not conform to the statute either in substance or in form.” The action of the court upon it is not shown by the judgment-entry, but the bill of exceptions states that the demurrer was overruled by the court. The defendant pleaded not guilty.

On the trial of the case, one witness introduced by the

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State testified that he had seen the defendant, travelling in Autauga county, in a wagon like those used by sewing machine agents or peddlers, and that he had in it two or three sewing machines. Another witness said, "that within twelve months before the finding of the indictment, the defendant came to his house in Autauga county, and there sold him a sewing machine, for which he paid defendant in cash." On cross-examination, he said that he saw the defendant last summer in the city of Selma, and that he tried to exchange a sewing machine for a yoke of oxen which the witness had in Selma. No trade was made, but he invited the defendant to come to his house in five or six weeks, for that purpose. At the appointed time the defendant went to the house of the witness, in Autauga county, and carried with him a sewing machine, which the witness purchased. This was all the evidence in the case. The defendant asked the court to give the following charges, in writing, to the jury :

"1. The jury, before they can render a verdict of guilty, should be satisfied, beyond a reasonable doubt, that the defendant engaged in, or carried on the business of a sewing machine company and sold machines, in Autauga county, without license.

"2. The mere proof that the defendant sold one, two or three sewing machines, is not sufficient to warrant a conviction for engaging in, or carrying on the business of selling sewing machines."

The court refused to give these charges, and to such refusal the defendant excepted.

WM. C. WARD, for the appellant.—1. Revenue laws being in their nature highly penal, must be strictly construed. *Cooley on Vox.* pp. 200-8 and 262; *Darr. on Statt.* 742-9.

2. The indictment must aver all the facts necessary to show that the defendant was of the class intended to be punished by the statute.—1 *Cranch. C. C.* 593. When the act describes the nature of the offence, it is necessary to use the particular words of the statute.—40 *Ala.* 44; 53 *Ala.* 481-488; 2 *Stew.* 11. The indictment framed under the statute must contain all the ingredients of the offence.—17 *Ala.* 181; 19 *Ala.* 586; 21 *Ala.* 218; 42 *Maine* 76.

3. The gist of the offence is to be a sewing machine company doing business without a license, and it is doubtful whether an agent under the statute can be indicted. Hence proper allegations ought to bring the accused within the purview of the statute.—36 *N. H.* 359; 17 *Wis.* 26; 50 *Ala.* 127;

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52 Ala. 19. Here the indictment is broader than the statute, and cannot be aided by intendment.—3 Stew. 123-4. Indictments for statutory crimes must conform strictly to statute, or employ other words fully as descriptive of the offence, or of equivalent import.—12 Ala. 732; 13 Ala. 413; 22 Ala. 9; 1 Bish. Crim. Prs. §§ 277, 285.

4. Is not the section of the revenue law under which defendant is indicted unconstitutional, because it makes distinctions between citizens of this State and of other States? Cooley Const. Lim. pp 391-393. It must not be forgotten that the statute is aimed at sewing machine companies. Hence the rule laid down in *Ellsberry v. State* (52 Ala. 8), does not apply to this case. The charges should have been given.—52 Ala. 19; 50 Ala. 127; 16 Ala. 411.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—Section 490 of the Code of 1876 declares that, "It shall not be lawful for any person, firm, company or corporation to engage in, or carry on any business or profession hereinafter mentioned, without first having paid for and taken out a license therefor." Among the occupations thereafter mentioned, and coming within the influence of said section, is the following: "For each sewing machine company, selling sewing machines by themselves or agents, one hundred dollars, as a State tax."—Code of 1876, § 494, subd. 17. To come within these two sections, it is manifest that the person charged must have engaged in the business of selling sewing machines, and that such person or persons were or was a person, firm, company or corporation, or some member or agent of such firm, company or corporation, engaged as such in, or carrying on the business of selling sewing machines. In other words, the business must be engaged in, or carried on, and by some person, firm, company or corporation, or an agent of such; and the offence is not made out, unless there is a selling of sewing machines by the sewing machine company, or their agent. The indictment, to be sufficient, must charge that the offender or offenders did engage in or carry on the business of selling, and did sell sewing machines, without first having paid for, and taken out a license therefor, &c., and that at the time he (or they) engaged in, or carried on the business of selling, and did sell such sewing machines, he or they were members of the said sewing machine company, (or were agents of the said sewing machine company, and selling as such agents, as the

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facts may require). This ruling may exact great particularity, and much difficulty of proof; but such are the requirements of the statute. Only the persons composing sewing machine companies, and their agents, engaging in, or carrying on the business, are embraced in the statute. The indictment is totally defective, and the verdict should have been set aside, and the judgment arrested.—*Harris v. State*, 50 Ala. 127, and authorities.

We deem it unnecessary to particularly notice the charges requested, further than to say that if the other ingredients of the offence were proved, it would not necessarily follow that a sale of "two or three sewing machines is not sufficient to warrant a conviction for engaging in or carrying on the business of selling sewing machines." This is a question for the jury.

We have not considered the demurrer, because the ruling upon it is not shown in the judgment-entry.

Reversed and remanded. Let the defendant remain in custody until discharged by due course of law.

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Larceny of an Outstanding Crop.

1. *An indictment laying property in a servant is insufficient.*—A superintendent of another's plantation is the servant of the employer; and an indictment for larceny, which charges that the corn stolen was the property of such superintendent, is insufficient.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JAMES Q. SMITH.

At the fall term, 1876, of the Circuit Court of Lowndes county, the defendant was indicted for the larceny of a part of an outstanding crop of corn, alleged to be the property of S. A. Satterwhite. The defendant pleaded, "not guilty."

It was proven that the defendant took and carried away a bushel of corn which grew, and was standing, on the plantation belonging to the estate of J. W. Cook, of which S. G. Jones was the administrator. It was shown, also, that Jones did not live upon the premises, but resided in Lee county; and that he employed one S. A. Satterwhite to superintend the cultivation of the plantation and to take care of the property.

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Beyond this, Satterwhite had no interest in it. This was all the evidence in the case.

The defendant asked the following charge, which was in writing, but the court refused to give it, and the defendant excepted:

“If the evidence showed that said crop, a portion of which is alleged in the indictment to have been taken, was the property of the estate of J. W. Cook, and that S. A. Satterwhite had no other interest in said crop, except that he was employed and acted as superintendent of the plantation, in the management, cultivation and raising and gathering of said crop, then they cannot convict the defendant under this indictment.”

CLEMENTS & ENOCHS, for appellant.—1. Satterwhite was merely the servant of S. G. Jones, the personal representative of the estate to which the crop belonged. His possession was the possession of Jones, and the court erred in refusing to give the charge requested.—2 East P. C. P. 652; Russ. & Ry. 412; 2 Hale's P. C. 181; 5 Gratt. 596; 53 Ala. 460.

JOHN W. A. SANFORD, Attorney-General, *contra*.

MANNING, J.—The objection alleged to the proceedings in the cause is that the ownership of the property charged to have been stolen, is in the indictment ascribed to one Satterwhite, while the evidence shows that he was only superintendent, for another, of the premises from which it was taken.

A bailee or person who has a special property in a chattel, may be alleged in an indictment for the larceny of it, to be the owner, when it was taken from his possession—but not a servant. A servant's possession is considered as that of the master or employer. The distinction though, between these relations is not always clear. It has also been suggested that, as larceny is always accompanied by a trespass (except in some cases of a peculiar kind, as larceny by a bailee), any person—and only a person—who could maintain the action of trespass for the taking of a chattel, may properly be alleged as the owner of it, in an indictment for the larceny of such chattel. And this is probably a good rule. But here, too, the question whether a person in the situation of Satterwhite could maintain trespass for the taking of the corn, alleged to have been stolen, is not free from difficulty. A servant can not maintain that action for a taking of the goods of his master. So the two questions seem in this case to be resolved again into one: Was Satterwhite a servant, or not, within the legal signification of the word?

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It was held in Massachusetts, that if a person is engaged under a contract "in an independent operation, not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but is said in modern phrase, to be that of contractor and contractee." *Forsyth v. Hooper*, 11 Allen, 419. In other cases, the relation may be that of bailor and bailee. This was held in *Hare v. Fuller* (7 Ala. 717), in which, "it was proved that the plaintiff was the agent of one Rhinehart, and as such, had the management and possession of his stock of hogs, they not being penned up: Rhinehart had left the country, leaving the plaintiff to control and take care of them." This court considered the plaintiff to be a bailee, and entitled to maintain trespass for injuries done to the hogs. See also, *Cox v. Easley* (11 Ala. 363), where, in opposition to rulings in Massachusetts and New York, it was here held that a person to whom a sheriff delivered goods taken by him in execution, upon a contract with security to have them forthcoming on the sale day, to be sold, had such a property in them as enabled him to maintain trespass against a third person for taking them away: Whence, contrary to *Commonwealth v. Morse* (14 Mass. 217), it follows, that such a bailee may properly be averred to be the owner of such goods in an indictment for stealing them. In these cases, the doctrine is recognized that a servant is not to be considered as having a special property. Was Satterwhite an employee of that class?

A servant is one who is engaged not merely in doing work or services for another, but who is *in his service*, usually upon or about the premises or property of his employer, and subject to his direction and control therein, and who is, generally liable to be dismissed.

Hence a person, whom a railroad company employs to get out cross-ties, or build a section of their road, according to certain specifications and at a certain price, or whom a planter employs to build a house, or dig a ditch of certain dimensions upon terms agreed upon, is not a servant of his employer. But persons who are engaged as conductors, or other employees of railroad-trains, to assist in running them, and a person who is employed as superintendent of the business of a railroad company according to such schedules and arrangements or directions, as the company may from time to time prescribe, come within the definition laid down, and may properly be regarded as servants, within the legal meaning of that word.

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In like manner the superintendent for another of a plantation of the latter, is we think properly a servant of his employer. We understand him to be an overseer, one who is employed to carry on the business of a plantation according to the directions from time to time given by his employer, being bound in that capacity, to look well after and take good care to promote—the interests of the latter. And it has never, that we are aware of, been the practice, in legal proceedings, to regard an overseer as having a special property in the things of which he had such supervision and control, or to consider him as authorized to sue in respect of them, in his own name.

According to our view of the law, the corn alleged to have been stolen by appellant, ought to have been described as property of Jones, the administrator of the estate to which it belonged.

Let the judgment be reversed and the cause be remanded.

Coleman v. The State.

Indictment for Carrying Concealed Weapons.

1. *A preponderance of probabilities will not sustain a conviction.*—On a trial of a criminal offence, it is error to refuse a charge asked in writing, “that the defendant is presumed to be innocent until his guilt is established, and the evidence to induce or authorize a conviction should not be a mere preponderance of probabilities, but should be so strong and convincing as to lead the mind to the conclusion that the accused can not be guiltless.”

2. *The cases of Murphy v. State and Mose v. State approved.*—Such a charge uses almost the identical language employed by the court in *Murphy v. The State* (6 Ala. 845); and the same principle is declared, in different language, in *Mose v. The State* (36 Ala. 845). These two statements of one and the same principle have long stood as guides, and can not be questioned.

3. *The law requires moral, not mathematical certainty.*—When a charge embodying the principle of these two decisions is requested, the court should give it; and then in a distinct charge should instruct the jury that it is moral, not mathematical certainty of proof, which the law requires.

4. *A reasonable doubt is properly defined.*—The court approves the definition of a “reasonable doubt” which will justify an acquittal, given in *Mose v. The State*, and must not be understood as qualifying the doctrine there declared.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The defendant was indicted for carrying a pistol concealed about his person. He was arraigned, and pleaded “not guilty.”

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The defendant was, on some night in July, 1877, at a political meeting held at Grattan's store, in Montgomery county. At that time and place, he drew from behind his person a pistol, which was worn beneath his coat. Until it was drawn, the pistol was entirely concealed from observation. There was one witness who swore the defendant did not draw the pistol, but it was handed to him by some person in the crowd.

The defendant asked the court to give this charge, in writing: "In all criminal cases, the defendant is presumed to be innocent, until his guilt is established, and the evidence to induce or authorize conviction, should not be a mere preponderance of probabilities, but should be so strong and convincing as to lead the mind to the conclusion that the accused can not be guiltless." The court refused to give the charge, and the defendant excepted.

JOHN GINDRAT WINTER, for the appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—In the case of *The State v. Murphy*, 6 Ala. 845, the question was, whether the same measure of proof was required to justify a conviction of misdemeanor, as was required in cases of felony. This court ruled, that it was. In expressing its opinion, the court employed the following language: "Every one, charged with the commission of an offence against the law, is presumed innocent, until his guilt is established; and the evidence, to induce conviction, should not be a mere preponderance of probabilities; but it should be so convincing as to lead the mind to the conclusion that accused can not be guiltless."

So, in *Mose v. The State*, 36 Ala. 211, this court ruled that a charge asked, in the following language, should have been given, namely: "That unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offence imputed to him, they must find him not guilty."

These two statements of one and the same principle have stood as guides, and without material impairment, for many years. We have no intention now to question them. They are but strong expressions of that full measure of proof which the law exacts, before it will sanction a conviction of a criminal offence. But, given nakedly, and without explanation, we fear they may, and sometimes do, produce an erro-

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neous impression on the minds of the jury. The rule is not so severe as to deny conviction, "unless the evidence should be such as to exclude to a moral certainty every possible hypothesis but that of guilt."—See *Mose v. The State*, *supra*. Human testimony is rarely so clear and full, as to exclude conjectured, divergent possibilities. Neither does mathematical certainty, or physical impossibility, define the rule. Conviction, resting on human testimony, can never attain the certainty of mathematical demonstration, or repel all possible doubt of its correctness. A rule so exacting would paralyze the punitive arm of the law. "A doubt which requires an acquittal, must be actual and substantial, not mere possibility or speculation. It is not a mere possible doubt, because every thing relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt."

In connection with the sentence first above quoted from *Murphy's* case, the distinguished jurist delivering the opinion said, "If, after subjecting the facts to the test of reason, there is still a doubt as to his guilt, it is the duty of the jury to acquit; but a mere misgiving of the imagination, suggestion of ingenuity, or sophistry, or misplaced sympathy, is not a reasonable doubt, to which the law accords any influence." This was evidently intended by him as the complement of the rule, and was employed by him to prevent all misapprehension of the strong language he had just uttered. It shows the sense in which he used the words "*can not be guiltless*;" that is, that the guilt of the accused must be made morally certain by the evidence, and so clearly shown as to exclude every reasonable doubt; but a "misgiving of the imagination, suggestion of ingenuity, sophistry, or misplaced sympathy," one, or all of these, are not enough to require or justify an acquittal, if the proof be otherwise full, clear, and credible, and convince the jury to a moral certainty that the accused can not be guiltless. In this we but reiterate what Chief-Justice WALKER said in *Mose's* case, *supra*.

In giving the charges copied from the cases of *Murphy* and *Mose*, *supra*, the courts, to prevent misapprehension, should further declare to the jury, that it is moral, not mathematical certainty of proof, which the law requires; and should also give in charge the explanation of the language given by this court, in connection with each of the extracts which form the charges requested in this case. Such expla-

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nations should be given in distinct charges, to comply with the statutory rule.

We do not intend to be understood as qualifying the doctrine as to reasonable doubts. A reasonable doubt, to justify an acquittal, has been well defined to be, "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition, that they can not say they have an abiding conviction to a moral certainty, of the charge."—*Mose's case, supra; Webster's case*, 5 Cush. 320.

We hold that the charge asked and refused in this case should have been given.

Reversed and remanded.

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Indictment for Murder.

1. *An objection to a list of jurors may be waived.*—A prisoner on trial for a capital felony may waive an objection that the list of special jurors summoned and served on him, contains fewer names than the law requires; or that the name of the same person appears twice on the list. If he calls the attention of the court to the irregularity, or mistake, before trial, but makes no motion, based on the irregularity, or otherwise objects to it, he cannot after verdict, move an arrest of judgment, or in any manner avail himself of it.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

The prisoner was indicted at the spring term, 1878, of the Circuit Court of Butler county, for the crime of murder. He was arraigned and pleaded "not guilty." A day was appointed for the trial, and the court made an order, requiring the sheriff of the county "to summon fifty competent jurors, including the regular panel for the week; and to serve a list of the jurors summoned, and a copy of the indictment upon the prisoner, one entire day before the day set for the trial of the cause.

On the day of the trial, the prisoner being present in court, his counsel called the attention of the court to what he supposed to be an error in the copy of the list of jurors, served on the prisoner. He said, "at the time, that he did not make any motion to quash the venire, and if it was an error which

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could be waived, he was willing to waive it, and would do so, but that he did not believe it was such an error as could be waived by the prisoner." The supposed error consisted in the alleged fact, that the name of John M. Sims occurred in two places on the list of jurors, which had been served on the prisoner."

The list was handed to the court for inspection. The clerk stated that he had made the copy," and that when the name first occurred, it was intended for *Jas. M. Sims*, and the second time it was written for *Jno. M. Sims*."

It appeared that the sheriff had summoned both James M. Sims and John M. Sims; that both of them were called, duly examined, and accepted as jurors by the State and the prisoner.

The jury, under the instructions of the court, retired and returned this verdict: "We, the jury, find the prisoner guilty of murder in the first degree, and we further find that he shall suffer death."

On a subsequent day of the term, the defendant moved an arrest of judgment, on the ground "that the venire, or the copy served on him, contained the names of but forty-nine jurors, the name of John M. Sims appearing in two places on said venire."

This motion was denied by the court, and the defendant excepted.

No counsel for appellant.

JOHN W. A. SANFORD, Attorney-General, for the State. Not less than fifty or more than one hundred jurors can be summoned for the trial of a capital felony.—Code § 4874.

1. But, as the prisoner may waive any right conferred either by statute or by the constitution for his benefit and protection, he may waive the summoning of the full number of jurors ordered by the court for his trial.—1 Bish Cr. Pro. §§ 407-422; 1 Bish. Crim. Law. (6 ed.) § 995. And having waived the supposed defect in the venire, he cannot now be heard to complain of it.

3. The venire should not have been quashed even if the same name had occurred twice in the list of jurors delivered to the prisoner.—*Floyd v. The State*, 55 Ala. 61.

MANNING, J.—The fact that in the list of persons summoned, to serve as jurors in this cause which was delivered to defendant, a mistake in writing the name of *Jno. M. Sims*, instead of *Jas. M. Sims*, if such mistake was made, (which

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seems doubtful), did not, under the circumstances set forth in the bill of exceptions, afford a legal cause why the judgment of the Circuit Court should be arrested. At the time the attention of the court was called to the supposed error, by counsel for the defendant, he said "if it was an error which could be waived, he was willing to waive it, but that he did not consider it such an error as could be waived by the prisoner." No objection, however, was then otherwise, taken; nor was any motion founded upon the supposed error made before the verdict was rendered. James M. Sims, the person whose name was supposed to have been incorrectly written, upon being called, appeared and was accepted by the defendant as a juror, and served as such.

There is no doubt that a preliminary irregularity of this sort can be waived.—See *Paris v. The State*, 36 Ala. 235; *Miller v. The State*, 45 Ala. 24; *Mitchell v. The State*, at this term. The court did not err in overruling the motion in arrest of judgment.

The judgment of the Circuit Court must be affirmed. And it is here adjudged that the execution of the sentence of that court be carried into effect according to the terms thereof. Let the judgment of this court be certified without delay to said Circuit Court.

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Living in Adultery or Fornication.

1. *Intermarriage of white and black persons forbidden*—The marriage of a white woman and a black man is absolutely void; and the offending parties must be treated as unmarried persons, and their sexual cohabitation as fornication, within the statute.

2. *The Penal Code was constitutionally enacted*.—Section 4189 of the Code was taken from the Revised Code of 1867; thither it was carried from the Penal Code of 1866; and the enactment of the statute "to establish a new Penal Code" was a constitutional enactment of all the provisions contained therein.

3. *Advice of probate judge inadmissible as evidence*.—The court did not err in refusing to receive testimony that, before the alleged marriage, the probate judge informed the defendant it was lawful for him to marry a white woman.

4. *An unlawful act, intentionally done, is a crime*.—To constitute a crime, there must be both an intent and an act; if the act is intentionally done, the criminality necessarily follows.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

[Hoover v. The State.]

The grand jury of Talladega county presented the following indictment:

"The State of Alabama, Talladega county. Circuit Court, fall term, 1876. The grand jury of said county charge that, before the finding of this indictment, Robert Hoover, a negro man, and Betsey Litsey, *alias* Elizabeth Litsey, a white woman, did live together in a state of adultery or fornication, against the peace and dignity of the State of Alabama."

The defendant, Betsey Litsey, was not put upon her trial.

The defendant, Robert Hoover, pleaded to the indictment, "not guilty," and "the special plea of marriage duly and legally entered into before the finding of the indictment."

The defendant, Hoover, a negro man, and the defendant, Betsey Litsey, a white woman, lived together openly, "in a house containing only one room, at 'Needmore,' a suburb of the town of Talladega, during the year 1876, and afterwards they lived together at the 'Tom Curry 'place,' distant from Talladega three or four miles. They represented themselves to be married, and recognized each other as husband and wife. It was admitted that Betsey Litsey and Sarah Elizabeth Smith are one and the same person. The State introduced the following:

"The State of Alabama, Talladega County. To any ordained or licensed minister, judge of the Circuit or Probate Court, or justice of the peace of said county, greeting: You are hereby authorized to celebrate the rites of matrimony between Robert Hoover and Sarah Elizabeth Smith, and this shall be your sufficient authority for so doing. Given under my hand and seal, this sixth day of March, 1875.

"GEORGE P. PLOWMAN, P. S.,

"Judge of Probate."

Under the signature of the judge of probate were written these words:

"The above named parties were married by me, at George Isbell's, on the sixth day of March, A. D. 1875.

"JOHN LIVINGSTON."

The defendant offered to prove, by the judge of probate, that, before the marriage license was issued, the defendant asked him if it was lawful for him (Hoover) to marry a white woman, and that he was informed that it was. The judge of probate also told him that, the Supreme Court had decided the law forbidding such marriages to be unconstitutional. The State objected to this evidence; the court sustained the objection, and the defendant excepted.

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The court, among other things, charged the jury, "that the marriage shown in this case was forbidden by law, is a nullity, and is no protection to the parties who are guilty as charged in the indictment, if the evidence shows, beyond a reasonable doubt, that Hoover is a negro man and Litsey a white woman, and that they have been cohabiting as husband and wife, in Talladega county, within three years before the finding of this indictment." To this charge the defendant excepted, and then asked the court to give the following charges, which were in writing: "*First*, if the jury believe the evidence, they must acquit the defendant; *second*, if the jury believe, from the evidence, that the defendant was married to Betsey Litsey, by a minister of the gospel, on the sixth day of March, 1875, under and by virtue of a marriage license issued out of the Probate Court of Talladega county, they cannot find him guilty; *third*, the theory of the law is, that a criminal intent is a necessary ingredient in every crime; *fourth*, the intent with which the man lived with the woman, Litsey, must have been criminal, or the jury cannot convict; and they may look to their manner of living and to their marriage record in determining their intent."

The court refused to give each charge, and to the refusal of each the defendant separately excepted.

GEORGE W. PARSONS, for the appellant.—1. There never was a statute of Alabama forbidding marriage between whites and negroes, and declaring it to be void *ab initio*; but only a statute (§ 4189 Code, 1876), declaring that if any white person and any negro . . . intermarry . . . each of them must, on conviction, be imprisoned in the penitentiary, &c.

2. Section 4189, *supra*, which prescribes a punishment for such marriages, the same being section 3602 of the Revised Code, and section 61, Penal Code, 1866, though on the statute book since February, 1866, was never passed by any legislature of Alabama, consequently never was, and is not now a valid law.—*Jones v. Hutchinson*, 43 Ala. 721; *Dane v. McArthur*.

3. If the foregoing propositions be incorrect, the defendant is not criminally liable, because he was married in March, 1875, nearly three years after the decision of *Burns v. The State* (48 Ala. 195), declaring section 4189, *supra*, to be unconstitutional, null and void.

4. If section 4189 has been of force, notwithstanding the decision in *Burns v. The State*, still the defendant is not guilty as charged in the indictment.

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JOHN W. A. SANFORD, Attorney-General, *contra*.—Cited case of *Green v. The State*—and authorities therein quoted—at present term.

STONE, J.—In *Green v. The State*, at the present term, we entered into an elaborate discussion of section 4189 of the Code of 1876, which prohibits, under severe penalties, intermarriage and living in adultery or fornication between white and colored persons, and declares such marriages void. We are satisfied with the arguments then used, sustained, as the opinion was, by the highest authority, and will not repeat or review it here. The marriage being absolutely void, the offending parties must be treated as unmarried persons, and their sexual cohabitation as fornication within the statute.

The act “to establish a new penal code,” Pamph. Acts 121, approved February 23, 1866, contains the section which is now 4189 of the Code of 1876. That section was carried into the Code of 1867 as section 3602. It was approved in the adoption of each of the Codes of 1867 and 1876. The enactment of the statute “to establish a new penal code,” was a constitutional enactment of all the provisions contained therein.—*Dew v. Cunningham*, 28 Ala. 466.

The Circuit Court did not err in refusing to receive testimony that, before the alleged marriage, the probate judge counselled the defendant it was lawful for him to marry a white woman. The maxim, *ignorantia legis, neminem excusat*, is a stern, but inflexible and necessary rule of law, that has no exceptions in judicial administration, and the former erroneous ruling of this court furnishes no excuse which we can recognize.—*Boyd v. The State*, December term, 1876; S. C. 4 Otto, 645.

It is very true that to constitute a crime, there must be both an act and an intent. But, in such a case as this, it is enough if the act be knowingly and intentionally committed. The law makes the act the offence, and does not go farther, and require proof that the offenders intended, by the prohibited act, to violate the law. The act being intentionally done, the criminality necessarily follows.

There is no error in the record, but we consider this a case for executive clemency, on condition there be given satisfactory assurance of a discontinuance of this very gross offence against morals and decorum. Should the crime be repeated or continued, the law should lay a heavy restraining hand on the offenders.

Affirmed.

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Lawrence v. The State.

Retailing without License.

1. *A name not idem sonans will sustain a plea in abatement.*—The name of Zachary is not *idem sonans* with that of Zachariah, and the difference is so material, that it will sustain a plea in abatement by a person of the former name indicted under the latter.

2. *A plea in abatement can be filed when defendant appears first.*—A plea in abatement in a criminal case is interposed in time, if it should be filed at the first term at which the defendant appears.

3. *Oyer of an indictment need not be craved.*—It is not necessary to crave oyer of an indictment before pleading in abatement to it. It must necessarily be read to the defendant, or a copy served on him without his praying oyer of it.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. WILLIAM L. WHITLOCK.

At the spring term, 1877, of the Circuit Court of Cherokee county, the defendant was indicted under the name of "Zachariah Lawrence, for engaging in, or carrying on, the business of a wholesale dealer in spirituous liquors, without first having paid for and taken out a license therefor." At the next term of the Circuit Court, the defendant filed the following plea in abatement:

"*The State v. Zachariah Lawrence.* Zachary Taylor Lawrence, indicted by the name of Zachariah Lawrence, in his own proper person cometh into court here, and having heard said indictment read, saith that his name is, and always hath been from his nativity, Zachary Taylor Lawrence, and by that name he hath always been called and known. Without this, that he, the said Zachary Taylor Lawrence, now is, or at any time hitherto hath been, called or known by the name of Zachariah Lawrence, as by said indictment is supposed, and this he, the said Zachary Taylor Lawrence, is ready to verify. Wherefore, he prays judgment of the said indictment, and that the same may be quashed."

The plea was duly sworn to and subscribed by the defendant. "Thereupon, the State, by her solicitor, moved the court to strike out the said plea from the file, on the ground that the plea was not filed in time, and did not *crave oyer* of the bill of indictment, and that Zachary Lawrence and Zachariah Taylor Lawrence were *idem sonans*." The court sustained the motion, and ordered said plea to be stricken from

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the files. To this ruling and action of the court, the defendant excepted.

As this question was the only one decided by the court, it is unnecessary to set out all the facts of the case.

SAYRE & GRAVES, for appellant.—1. The indictment is entirely defective. The first count does not conclude, against the peace and dignity of the State of Alabama.—Rev. Code, § 4844.

2. No place where the business was carried on is alleged in either count, and this is essential.—Acts of 1875, p. 80, § 7, subd. 3; *Hafter v. The State*, 51 Ala. 37.

3. A conviction or acquittal could not, under this indictment, be set up as a defence to another indictment.

4. The indictment does not show in either count that appellant engaged in the business, &c. In the first, it confines the business to one-half gallon; in the second, to half a quart.

5. The plea in abatement ought not to have been struck out.—*Diggs v. The State*, 49 Ala. 318. Zachariah and Zachary are two distinct names.—Webster's Dic.; *Humphrey v. Whitten*, 17 Ala. 30.

6. The oath set out in the judgment entry is insufficient. *Herron v. The State*, 53 Ala. 486. The jury are not sworn to do any thing.—Code, § 4765.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The demurrer to the indictment appears only in the bill of exceptions, and therefore will not be considered by this court. *Pounds v. Hamner*, Head-notes, Dec. 1876, p. 80. But the demurrer was properly disallowed. The constitution of the State does not require each count of an indictment to conclude with the words, "against the peace and dignity of the State of Alabama." It is sufficient, if the indictment so concludes.—Const. art. vii, § 28; Rev. Code, § 411; *McGuire v. State*, 37 Ala. 161.

2. To engage in or carry on the business of a wholesale liquor dealer, without obtaining a license, is a misdemeanor. Acts 1875-6, p. 79, § 6, and p. 80, par. 3, § 7.

3. The indictment charged the accused with having engaged in the business of a wholesale liquor dealer in a place of less than one thousand inhabitants, in Cherokee county, but the name of the place was unknown to the grand jurors. This takes the case out of the influence of the opinion of *Hafter's* case, in 51 Alabama, 37, and of *Harris'* case, in 50 Alabama, 127.

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4. The record does not purport to set out the oath administered to the jury. It says the jurors were sworn "as the law directs." This is equivalent to the phrase "according to law," and is a compliance with the requirements of the Code. *Moore's case*, 52 Ala. 424-6. Moreover, no objection was made at the time to the mode in which the jury was sworn; and where the record states the jury was sworn, without setting out the oath, this court will presume the statutory oath was administered.—*DeBardelaben's case*, 50 Ala. 179-80, and authorities cited; *Smith's case*, 53 Ala. 486.

5. The charge asked by the accused was properly refused. It made the guilt of the accused to depend on the fact it was his purpose to derive a profit from the sale of the liquor alone. He might have sold the liquor for the purpose of attracting customers for the purchase of other articles of merchandise. If it was a part of his business, whether he hoped to derive a profit or not, he should have taken out a license.—*Weil v. State*, 52 Ala. 19, 21-2.

MANNING, J.—Zachary Taylor Lawrence, having been indicted by the name of Zachariah Lawrence, at the spring term, 1877, of the Circuit Court of Cherokee county, for selling spirituous liquors without a license, was in July afterwards, arrested—and gave bail to appear at the next term thereafter of the court, to answer the charge. He accordingly then appeared and pleaded in abatement the misnomer. Whereupon, the solicitor moved to take the plea from the file, because, as was alleged it was not filed in time, did not craveoyer of the indictment, and did not contain sufficient substance, the two names Zachariah and Zachary being *idem sonans*; and the court ordered the plea to be taken from the file.

If this was done because the plea was not filed during the term at which the indictment was found, the court erred in making the order. Until the party had been informed of the indictment, he could not plead to it. The second term of the court was the appearance term in this instance; and it was sufficient if the plea was then duly interposed.

In *Russell v. The State* (33 Ala. 371), commenting on a section of the Code which required the objection, that a grand jury "were not drawn in the presence of the officers, or a majority of them designated by law," to be made at the term at which the indictment was found—this court said, in respect to such an objection by a defendant who was then in jail in another county and was not brought to the court: "We will

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not construe the statute as prohibiting peremptorily and absolutely, the making of the objection at a subsequent term. In giving it such a construction, we should, by a blind adherence to the letter, allow it an operation in derogation of common right, and revolting to the sense of justice; we should make the failure to plead, at a time when the accused was uninformed of the prosecution, or kept away by imprisonment, a waiver of the right to plead." The plea of misnomer in this cause should not have been excluded for the reason that it was not filed until defendant's appearance term.

Oyer is demandable of an instrument on which an action is founded and of which *profert* should be made, but which is not set out in full in the pleading. An indictment is read of course, to the defendant, or he is furnished with a view or copy of it—as a part of the prosecution against him; and *oyer* of an indictment is not needed to enable him to plead that his name is not correctly set forth in it.

The plea in abatement was certainly not deficient in substance. The names, *Zachariah* and *Zachary*, are not so alike in sound, that it can be said there is not any material difference between them. They are in fact different names; more so than *Humphrey* and *Humphreys*, in respect to which this court has held that a plea in abatement of misnomer by a person of the former name, was good in a suit brought against him by the latter.

The circuit judge erred in ordering the plea in abatement to be taken from the file. And as the indictment will probably be quashed, in the court below, it is unnecessary to decide the other questions presented for our consideration.

Let the judgment of the Circuit Court be reversed, and the cause be remanded.

Snider v. The State.

Keeping Open Store on Sunday.

1. *Keeping open store for traffic on Sunday, is punishable.*—Under section 4443 of the Code, a merchant or shop-keeper, who keeps open store on Sunday, is not punishable, unless the store is kept open for the purpose of traffic.

2. *Whether or not a store is kept open for the purpose of traffic is a question for the jury.*—The purpose for which a store is kept open on Sunday is necessarily a question of fact to be found by the jury, under proper instructions. The transaction should be carefully scrutinized, and if on all the evidence,

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the jury are convinced, to a moral certainty, that there was in fact a sale, and that it was so intended at the time, then they should not hesitate to render a verdict of guilty.

3. *Merely keeping a store open on Sunday without traffic is no violation of law.*—Sabbath traffic, particularly, in intoxicating liquors, is offensive to a religious community; and the statute intended for its repression should be faithfully enforced. But merely keeping the doors of a store open on the Sabbath is not a violation of the law, unless there is traffic on that day.

4. *The law does not require an election to be made when several sales are proven.*—When the testimony shows more than one sale on the Sabbath, the doctrine of election does not apply. The different sales are merely evidences of the intent with which the store is kept open.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. JOHN HENDERSON.

The defendant was indicted at the spring term, 1877, of the Circuit Court of Coosa county, for keeping open store on Sunday. To this indictment he pleaded not guilty.

The defendant was a shop-keeper, and carried on a retail business in the town of Rockford. Besides liquors, he kept some other articles of merchandise for sale. He slept in a room in the back part of the building in which his store was kept.

One witness testified that, about christmas, 1876, he "often went to the defendant's place of business on Sunday mornings, and obtained a drink of whiskey," and had seen other persons do the same thing. He did not pay for the liquor at the time he drank it, nor did he see any one pay for liquor then. He had an account with the defendant, but did not know whether the liquor was charged to him or not.

The witness was asked "whether or not, at other times than those already mentioned, he ever got any spirits at the defendant's grocery, or saw others get drinks there within twelve months before the finding of this indictment?" The defendant objected to the question, on the ground that the State had already elected by proving sale or sales about christmas before the finding of the indictment. The court overruled the objection, and the defendant excepted.

The witness then said, he "had seen others go into the front room of the defendant and get whiskey on Sunday." The defendant objected to this evidence; but the court overruled the objection, and the defendant excepted.

"The court, among other things, charged the jury, that if the defendant, by his conduct, gave the public to understand that persons, desiring, could get spirits by the drink on Sundays, and by permission of the defendant such persons visited his store and got spirits to drink when they wanted it on Sundays, whether they went to the store-room and got it them-

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selves, or the defendant delivered it to them, and whether it was paid for by them or not, if it was in Coosa county, and within twelve months before the finding of the indictment, the defendant would be guilty as charged in the indictment." To this charge the defendant excepted, and asked the court to give the following charges, which were in writing:

"That before the jury can find the defendant guilty, as charged in the indictment, they must believe, from the evidence, beyond a reasonable doubt, and to a moral certainty, that the defendant was a merchant or shop-keeper, and that he kept open store on Sunday, for the purpose of selling goods, wares and merchandise, or other articles kept in said store, on Sunday."

"If the evidence of Pond (the witness) tends to show to the jury that the defendant kept open store on Sunday, about christmas, then they cannot look to the evidence of any other act for the purpose of conviction under this indictment.

"There can be no violation of law without an intention upon the part of the violator, and before the jury can find the defendant guilty, they must believe from the evidence in this case, beyond all reasonable doubt, and to a moral certainty, that the defendant kept open store on Sunday, with intent to carry on a trade or traffic in goods, merchandise, or other articles in the house, which it is alleged he kept open on Sunday."

The court refused to give the said charges, and to each refusal the defendant separately excepted.

S. J. DARBY and L. E. PARSONS, JR., for appellant.—The fact that a store door is allowed to stand open on Sunday, does not constitute the offence of keeping open doors on Sunday. The purpose must have been to trade on Sunday, and the offence is complete when the purpose to trade, or trading is done, whether the doors are open or not.

An indictment is insufficient when the prosecution must prove more than its allegations, to convict.

The State having elected to proceed for the act proven about christmas, should have been confined to that act. Keeping open doors for the purpose of trade, on each Sunday, is an offence complete in itself. Under the ruling of the court, it would be impossible to sustain a plea of *autre fois acquitor convict* on a trial for a like offence charged within twelve months before the finding of the indictment.—2 Green. Ev. § 86; 1 Bish. Crim. Pro. § 461; *Elam v. The State*, 26 Ala. 48; *Cochrane v. The State*, 30 Ala. 542.

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When one act constitutes the offence, evidence of any act is an election, and the State cannot introduce evidence of any other act or offence.—*Elam v. The State, supra.*

The fact that the charge contains the words to “a moral certainty” does not render the charge erroneous.—*Mose v. The State*, 36 Ala. 341.

JOHN W. A. SANFORD, Attorney-General, *contra.*

STONE, J.—The defendant was indicted under section 4443 of the Code of 1876, which enacts that “any person . . . who, being a merchant or shopkeeper (druggists excepted), keeps open store on [Sunday], must, for the first offence, be fined not less than ten, nor more than twenty dollars,” &c. The indictment charges that the defendant, “being a retailer of spirituous liquors, or merchant, or shopkeeper, and not a druggist, did keep open store on the Sabbath.” The indictment does not pursue the statute literally, but its averments bring it substantially within the statute.

What is meant by the terms, “keeps open store?” We do not think it can be the simple fact, accidental or otherwise, that the door of the store or shop is open, or kept open. A store and the proprietor’s dwelling are sometimes in the same house and on the same floor; and the opening of one results in the opening of the other. The legislature did not intend to prohibit or punish an act like this. What they intended was to prohibit the keeping of open store, or open doors, for purposes of traffic. It was this which was considered offensive to morals. If the defendant kept his store, or the door of it, whether front or rear, open on the Sabbath, and by means thereof sold merchandise, or other articles or commodities kept there for sale, then he violated the statute; and it makes no difference whether he himself dealt out the commodity, or permitted his customers to wait on themselves. The inquiry should be *sale vel non*. If the parties intended a sale, whether payment was presently made, or expected to be made afterwards, the statute was violated. And the store being open, one sale would constitute the offence.—*Smith v. The State*, 50 Ala. 159.

The purpose for which the defendant keeps open store on Sunday, is necessarily a question of fact and intent, to be found by the jury under proper instructions. Men who violate the law, rarely give publicity to their purpose. Artifice is frequently resorted to by law-breakers, with a view of concealing their real design. Circumstances should be scanned

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with earnest vigilance, that the real transaction be made to appear. And if, in survey of all the facts, the jury are convinced to a moral certainty that there was in fact a sale, and that it was so intended at the time, then they should not hesitate to pronounce the defendant guilty. Sabbath traffic, particularly in intoxicating drinks, is offensive to the moral sense of a religious community, and the statute intended for its repression should be faithfully enforced. But merely keeping the door of a store open on the Sabbath is not a violation of the law, unless then he traffic on that day.

The particular offence we are considering, is "keeping open store" on the Sabbath. A sale, or sales, made on that day, are but evidence to consummate the offence. They are ingredients, but not the statutory misdemeanor the legislature intended to repress. We do not think the doctrine of election applies to these mere evidences of the intent of one charged with keeping open store on the Sabbath.

If defendant was a druggist, this was defensive evidence for him to offer. It was not necessary for the prosecution to disprove it.—*Farrall v. The State*, 32 Ala. 557.

Several of the rulings of the Circuit Court are not in harmony with our views above expressed.

Reversed and remanded. Let the defendant remain in custody until discharged by due course of law.

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Indictment for Fornication or Adultery.

1. *Jurisdiction of Circuit Court ceases when that of County Court attaches.* The statute, "in relation to the trial of misdemeanors in Tuscaloosa and other counties therein named," requiring the Circuit Court to transfer to the County Court indictments for misdemeanors, declares the transfer must be ordered, and the papers, with a certified copy of all docket entries and minutes of proceedings had therein, delivered to the County Court before the jurisdiction of the Circuit Court ceases.

2. *Until order of transfer is made, jurisdiction does not cease.*—No order of transfer had been made in this case; neither the jurisdiction of the County Court had attached, nor that of the Circuit Court had terminated. A demurrer to a plea to the jurisdiction of the Circuit Court was, in view of these facts, properly sustained.

3. *Marriage may be proved by confession and cohabitation.*—Marriage may be proved by cohabitation and the confessions of the parties. Whether these are sufficient and convincing evidence of the fact depends on their connection and consistency with other facts which may be found in the particular case.

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4. *A charge that declarations and conduct were evidence is calculated to mislead.*—An instruction to the jury, at the request of the defendants, that their declarations and conduct were evidence of marriage, without explanation or qualification would confuse and mislead, and was properly refused.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

Aaron Green and Julia Chesser, *alias* Julia Green, were indicted at the fall term, 1876, of the Butler Circuit Court, for "living together in a state of fornication or adultery." At the next term of the court the defendant filed a plea to its jurisdiction in these words: "Defendants, for plea in this case, say that this court ought not to take or have jurisdiction thereof, and that it should not be tried in this court, because, they say, this cause is a misdemeanor, and was pending and untried in the Circuit Court at the adjournment of the last fall term, 1876, of the Circuit Court of Butler county, but had been continued before the adjournment of the court, and should have been transferred to the County Court of Butler for trial; and that the case being continued before the adjournment thereof, at said fall term, 1876, of the Circuit Court of Butler county, left it still pending and untried in the Circuit Court, and was such a case as should have been transferred to the County Court on the adjournment of the Circuit Court; and, as it was not then transferred, should now be transferred to the County Court of Butler for trial and this they are ready to verify."

To this plea a demurrer on the part of the State was interposed. It was sustained by the court, and the defendants excepted. They then pleaded "not guilty."

On the trial of the case it appeared that Aaron Green, a negro man, and Julia Green, a white woman, had lived together for several years; and on or about the first of January, 1876, went to the premises of Mr. McCrary, by whom they were employed as laborers. They represented themselves as married, and were known and recognized as husband and wife in the community. A marriage license, issued by the judge of probate of Butler county, dated the 11th day of July, 1876, and authorizing the celebration of the rites of marriage between Aaron Green and Julia Adkinson, was introduced as evidence by the State. On the license, under the signature of the judge of probate, were the following words:

"The above named were married by me, at Milt. Maycra-ries', on the 13th day of July, 1876.

"Elder ROBERT POUNDS."

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The defendants offered no evidence; but asked the court to give the following charge, which was in writing:

"If the jury believe, from the evidence, that the defendants came to Mr. McCrary's, and represented themselves as man and wife, and openly and notoriously lived together and cohabited as man and wife, this would be evidence of marriage between the defendants."

The court refused to give the charge, and the defendants excepted.

THOS. H. WATTS, for appellants.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The demurrer to the plea in abatement was properly sustained. Acts 1874-5, p. 235.

2. Marriages between white persons and negroes, or the descendants of negroes to the third generation inclusive, are forbidden by the laws of this State.—Code, § 4189. Therefore the cohabitation between such parties, under the sanction of a license, and pretended marriage, is no defence to this indictment.—*Ellis v. The State*, 42 Ala. 525; *Ford v. The State*, 53 Ala. 150.

BRICKELL, C. J.—The plea to the jurisdiction of the Circuit Court was not well founded. The statute requiring the Circuit Court to transfer to the County Court indictments for misdemeanors, in express terms declares the transfer must be ordered, and the papers with a certified copy of all docket entries and minutes of proceedings had therein delivered to the County Court, before the jurisdiction of the Circuit Court ceases.—Pamph. Acts 1874-5, p. 235. The transfer not having been ordered in this case, nor the papers and proceedings certified to the County Court, the jurisdiction of that court had not attached, nor had the jurisdiction of the Circuit Court terminated.

Marriage may be proved by cohabitation, and the confessions of the parties. Whether these are sufficient and convincing evidence of the fact, depends on their connection and consistency with other facts which may be found in the particular case. When taken in connection with these facts, it may appear the cohabitation was criminal, and the confessions untrue in fact, and it may be, fabricated to avoid the consequences of the illicit cohabitation. The cohabitation had in this case been shown by the State, and was the essential element of the offence with which the defendants are

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charged. Their declarations that they were man and wife, connected with the fact that they openly lived together as such, had been received in evidence without objection. An instruction to the jury, at the request of the defendants, that their declarations and conduct *were evidence of marriage*, without explanation, or qualification, could have no other effect than to confuse and mislead. The evidence was before the jury, and they would necessarily consider it in connection with the other evidence. A naked instruction that the facts were evidence of marriage, would invite the inquiry at once as to the character of the evidence. Whether the declarations and conduct were mere facts and circumstances tending to prove marriage, or mere *prima facie* evidence, or were conclusive evidence of the fact, without further instructions the jury could not determine. A court commits no error in refusing a charge requiring explanation or qualification, or which has an obvious tendency to mislead the jury. *Swallow v. State*, 22 Ala. 20.

There is no error in the record, and the judgment must be affirmed.

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Indictment for Permitting Gaming on Premises.

1. *The managers of a club are indictable, if gaming on the premises is permitted.*—The managers of a social club, whose members alone are permitted to buy spirituous liquors, sold in its rooms, may be indicted for permitting gaming on the premises.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

Emile Jacobi, Jacob Simmons, S. Roswald and Louis Goetter, were indicted at the July term, 1877, of the City Court of Montgomery, for permitting gaming on their premises. The defendants pleaded not guilty. They were the managers or superintendents of the "Standard Club," which was incorporated under the general laws of the State. It consisted of about fifty members, all of whom were "resident citizens" of Montgomery. The society was organized for literary and social purposes, and had a constitution and by-laws. According to them, no person not a member, unless expressly invited, could enter the premises, or be present

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at a meeting of the club. A record of all such visitors was kept, and no one residing in the city of Montgomery was permitted to enter the club-rooms more than once. Both the rooms and the meetings of the club were strictly private. It occupied for its purposes, three rooms on the second and third stories of a building in the city of Montgomery. Persons could easily pass from one of these rooms to the others. Spirituous liquors were purchased with the funds of the club, taken to the building and sold in one of the rooms of the club, to its members only. No person, not a member, ever bought or paid for liquors at the club-rooms.

During the time spirituous liquors were sold under the authority of the club, its members played cards in another of the rooms. At such games, money was sometimes bet. The defendants knew and permitted the card-playing. There was no conflict in the testimony, and the following charge in writing was requested on the part of the State and given by the court:

"If the jury believe the evidence, beyond a reasonable doubt, they must find the defendants guilty, as charged in the indictment."

To this charge the defendants excepted.

No counsel for appellants.

JOHN W. A. SANFORD, Attorney-General, *contra*.

MANNING, J.—The question here presented is, whether or not an incorporated social club, whose rooms are used in common by its members only and such other persons as may under its rules be invited thereto, for reading, conversation and diversion, and in one of which rooms spirituous liquors are sold by an agent of the club to its members—but to no other persons—can knowingly suffer gaming with cards, or dice, or any device or substitute for either, to be done in another of said rooms by said members or guests invited thereto as aforesaid, without a violation of law.

In the case of *Sol. Martin v. The State*, decided a few days ago, this court held that the agent of this same club, who sold liquors therein, for the club, to its members, without a license, was guilty of a violation of section 3618 of the Revised Code of 1867, prohibiting the retailing of spirituous or vinous liquors without a license, and sustained a conviction of such agent for that offence, and the judgment thereupon. From this decision, it seems to follow that the appellants here, who, by

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election of the members of the club, had the superintendence of its rooms and affairs, are, under the evidence in the case, liable to the penalties denounced by section 3625 of the same code, against "any person, who being a licensed retailer, or the keeper, proprietor, owner or superintendent of . . . any house where spirituous liquors are sold, retailed, or given away, . . . knowingly suffers" the gaming prohibited by previous sections to be done therein. As was said in a recent case of *Campbell v. The State* (in manuscript), it is the evils that flow from the alliance between the two occupations of retailing and gaming—the stimulus to each of the two vices of play and drinking to excess, which is reciprocally produced by the indulgence in both at the same time, that the statute was enacted to prevent. And though it was, evidently, not within the intention of the club, in this case, to foster these evils, and their purpose was to afford the means of diversion and to cultivate friendly social feeling among the members, we are constrained to hold that the statute referred to was violated,—and the judgment must be affirmed.

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Indictment for Embezzlement.

1. *Embezzlement can not be committed with different intents.*—An indictment charging that the defendant converted one hundred and eighty dollars, or other large sum of money, is fatally defective. The offence is not one that may be committed with different means or intents, or which may lead to different results; nor is it a case of several offences of the same character.

2. *Every charge must contain a substantial offence.*—Where two or more offences are laid in the same count disjunctively, each separate alternative charge must contain a substantive offence, charged with that degree of certainty which the statute requires.

3. *Certainty in an indictment is essential.*—In this case, the indictment is nothing more than a charge that the defendant knowingly converted or applied to his own use a large sum of money. This would be fatally uncertain and defective in a civil proceeding, and is equally so in an indictment.

4. *The agent of the auditor, who substitutes one currency for another of less value, is guilty of felony.*—A person who, representing and acting for the auditor in his official character, receives national currency as a part of the revenue of the State, and substituting for it a currency of less value, knowingly converts or applies any part of it to his own use, or to the use of another person, is guilty of a felony.

5. *The conversion of money by the collector is punished under funding act of 1873.*—The unlawful conversion of money, which the officer himself col-

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lected from the tax-payer, is punishable under section fourteen of the funding act of 1873.

6. *Every conversion of revenue is not indictable.*—It is not every conversion of the revenue which will constitute an indictable offence. A substitution of money of the same class, of equal or greater value, will not necessarily be criminal: hence, in prosecutions under the statute, the intent with which the substitution is made becomes material, and any relevant evidence to show the value of the substituted currency is admissible.

7. *Bank-notes included under the name of money.*—Since the introduction and free use of bank-notes and treasury-notes as a circulating medium and standard of value, they are understood to be embraced in the generic term money, as much as the authorized coin of the country.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

At the February term, 1877, of the City Court of Montgomery, the grand jury presented the following indictment: "The State of Alabama, Montgomery county. The grand jury of the said county charge, that before the finding of this indictment, William R. Noble knowingly converted, or applied to his own use, one hundred and eighty dollars, or other large sum of money, being a part of the revenue of the State of Alabama, against the peace and dignity of the State of Alabama." The defendant demurred to the indictment; the demurrer was overruled, and the defendant pleaded not guilty.

The defendant was employed as a clerk in the office of the auditor of the State. During his employment, the probate judge of Madison county sent by the express company to R. T. Smith, Auditor, a package containing "sixteen hundred and twenty-three 35-100 dollars of the revenue of the State of Alabama." This sum was composed of "State certificates, commonly called 'Patton money,' State obligations, commonly called 'horse-shoe money,' and two hundred and eighty-three 35-100 dollars of the paper currency of the United States." The package was obtained by the defendant from the office of the express company at Montgomery. On the third of May, 1875, a sum of money equal to that contained in the package was paid by the defendant into the treasury of the State, "under a warrant called a covering warrant, regular in form and signed by the auditor. On the back of the warrant, in the handwriting of the defendant, was the following memorandum:

"Currency, \$103.35; State certificates, \$20.00; State obligations, \$1500.00.—\$1623 35."

Evidence was offered by the State, showing that in May, 1875, "State obligations and certificates were selling in the market at a discount of about twenty-five cents upon the

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dollar. To this evidence the defendant objected, on the ground that it was illegal, irrelevant, and inadmissible under the indictment in the case." The objection was overruled, and the defendant excepted.

On the part of the defendant, no evidence was offered.

The defendant then moved the court "to exclude from the jury all the evidence, as improper, inadmissible, and insufficient to support the charge in the indictment." But the court refused the motion, and the defendant excepted. He then moved "to exclude the evidence relative to the package of currency, State obligations and State certificates sent by the judge of probate of Madison county, as illegal and irrelevant." The court overruled the motion, and the defendant excepted.

The court, among other matters, charged the jury, "that for all the purposes of this indictment, the paper currency of the United States, whether issued by the government or by the national banks, must be treated as money." To this charge the defendant excepted.

The court also charged the jury, "that the fourteenth section of the act of the legislature of this State, approved December 19, 1873, entitled 'An act to provide for the funding of the domestic debt of this State,' was entitled to no control or influence on this case." To this charge the defendant excepted.

The court further charged the jury, "that if, in May, 1875, and in the county of Montgomery, the defendant received the package mentioned in the testimony of the probate judge of Madison county, and if the contents of the package are correctly stated in the testimony of that judge, and were a part of the revenue of this State; and if, in May, 1875, and in Montgomery county, the defendant converted, or applied to his own use, any part of the United States paper currency contained in said package, by withholding any part thereof, and by paying, in lieu of the part so withheld, into the State treasury, State certificates or State obligations of less value in the market—then they should find the defendant guilty under this indictment." To this charge the defendant excepted.

The following charges were asked by the defendant in writing:

1. "That the paying into the treasury of different money than that received, was, in 1875, punishable only under the act of 1873, approved 19th day of December, 1873, and that the indictment in this case is not framed under that act; and

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the defendant can not be convicted on the present indictment under the facts shown by the evidence.

2. "That the jury can in no event find the defendant guilty, unless they believe, from the evidence, beyond a reasonable doubt, that the money converted by the defendant was gold or silver coin, or legal tender notes of the United States, and if there is no evidence, or insufficient evidence of this fact, the jury should find for the defendant."

The court refused to give the charges, and to the refusal of each of the charges the defendant excepted.

RICE, JONES & WILEY, for the appellant.—1. If any offence is shown in the indictment, it certainly is not embezzlement; but only a distinct statutory offence. It is alleged that the indictment is authorized by, and framed under section 115 of the revenue law of March 19, 1875 (Acts 1874-5, p. 45), which provides that "if any officer or person knowingly converts or applies any of the revenue of the State, or of any county thereof, to his own use," &c., "he shall be guilty," &c. It is obvious that an indictment containing the very words of that section and charging the accused with converting or applying a part "of the revenue of the State," without specifying any particular part, would be insufficient. Hence, it is plain that to make an indictment good under the section, the description and specification of what was converted or applied must go beyond the words of the section, and that the Code can not be invoked in aid of such an indictment.—30 Ala. 583; *Grant v. The State*, 55 Ala. 201.

2. The indictment is bad beyond all doubt, if the word money therein used is to be taken in the sweeping sense given to it in the first section of said act of 1875. If that broad definition is adopted, then the indictment is, in legal effect, the same as if it charged the application or conversion of one hundred and eighty dollars of gold, silver, or other coin, or bills of exchange, or bank-bills, or other bills or notes authorized to be circulated as money. No such indictment can be sustained.

3. If the word money is taken in its settled and fixed constitutional and legal sense, shown in 4 Alabama, 140, and many other cases, then the indictment is too uncertain. The uncertainty is made conspicuous by the words "or other large sum of money."—20 Ala. 83; 32 Ala. 583. The prosecution is in a dilemma: for any construction which makes the indictment good, necessarily makes one or more of the charges and refusals to charge, palpably erroneous.

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The indictment does not fit the evidence and the rulings of the City Court, or the evidence and rulings of that court does not fit the indictment. The court below should have sustained at least one of the motions made to exclude evidence, which motions were made after the evidence was closed. 7 Porter, 437; *Camp v. The State*, 27 Ala. 53. The evidence as to the market value of State obligations or certificates was palpably illegal and irrelevant. Their market value was no part of the case. If the evidence shows any offence, it shows the one created by the fourteenth section of the act of 1873.—Acts of 1873, p. 46. And therefore the indictment for it should have been framed under that section; but it is not so framed.—18 Ala. 415; 21 Ala. 218; 27 Ala. 53.

4. The act of 1873 did not repeal section 128 of the Revenue Law of 1868 (Pamph. Acts of 1868, p. 337), nor did said act of 1875 repeal the act of 1873. Section 115 of the act of 1875, as to the ingredients of the offence therein provided for, is substantially the same as said section 128 of the act of 1868. And there is no conflict between either of them and the act of 1873. Each has a distinct field of operation, and may well stand together. The act of 1873 operates precisely and specifically on just such substitution or exchange of currency as was proved in this case, and exempts or excepts such substitution or exchange from said act of 1875. As against the State such exchange or substitution is not a penal or indictable conversion or application, otherwise than by the said act of 1873.—9 Ala. 484, near close of the opinion.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—We often find, in opinions given by judges, the expression “that the rules of pleading are the same in criminal cases as in civil.”—1 Bish. Cr. Proc. § 43. This, another adds, “though the books contain more or less such language as is mentioned [above], and though this language is in a certain sense correct, still the practice is to require greater strictness in criminal matters than in civil.”—*Ib.* § 44. We think we may safely assert that, in the absence of statutory regulations, as high a degree of certainty is required in criminal pleadings as in civil.

In Bish. Cr. Proc. § 333, it is said to be “an established rule in respect to the statement of the offence in the indictment, that it must not be stated in the disjunctive, so as to leave it uncertain what is really intended to be relied upon as

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the accusation." So, this court held, in *Johnson v. The State*, that an indictment which charged that the defendant obstructed a highway "by fence, bar, or other impediment," was fatally defective.—32 Ala. 583.

Our statutes have somewhat relaxed the common law doctrine as to certainty and completeness of averment in criminal pleading.—See Code of 1876, §§ 4785, 4787, 4788. So, in three particulars, it is provided that the averments may be stated disjunctively:

"§ 4796. When the offence may be committed by different means, or with different intents, such means or intents may be alleged in the same count in the alternative.

"§ 4797. Where an act is criminal, if producing different results, such results may be charged in the same count in the alternative.

"§ 4798. Where offences are of the same character, and subject to the same punishment, the defendant may be charged with the commission of either in the same count in the alternative."

The present indictment charges that the defendant "knowingly converted or applied to his own use one hundred and eighty dollars, or other large sum of money." It will be observed that this is not the case of an offence that may be committed with different *means*, or *intents*, or which may lead to different *results*. Nor is it a case of *several offences* of the *same character*. Hence this case does not fall within either of the sections copied above.

In *Johnson v. The State*, *supra*, and in *Horton v. The State*, (53 Ala. 488), we held that when two or more offences are charged in the same count disjunctively, each separate, alternative charge must contain a substantive offence under the law, charged with that degree of certainty which our statute requires, namely, "in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment." This is probably nothing more nor less than the 'certainty to a common intent,' of which Lord COKE speaks.

Applying these rules: the indictment, in legal effect, is nothing more than a charge that the defendant knowingly *converted or applied to his own use a large sum of money*. This would be fatally uncertain and defective in a civil proceeding, and is equally so in an indictment. Under the form 50, of the Code of 1876, it would have been suffi-

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ciently certain if the averment had been "about the amount of" [any named sum.]

The graver question raises the inquiry, under what statute should the offence shown in the evidence in this cause be prosecuted? It is contended for the prosecution that the misconduct which the testimony tends to prove falls under section 115 of the Revenue Law, approved March 19, 1875. That section provides, "that if any officer or person applies any of the revenue of the State, or of any county thereof, to his own use, or the use of any other person, he shall be deemed guilty of a felony, and upon conviction thereof be fined not less than two hundred, nor more than one thousand dollars, and be imprisoned in the penitentiary not less than one year, one or both, at the discretion of the court trying the same."—Pamph. Acts, p. 45. This statute, in language, is not materially different from section 128 of the revenue law of 1868, save that it denounces the act as a higher grade of offence, and fixes a severer punishment.—Pamph. Acts, p. 337.

Considering this statute by itself, there can be no question that the act described by the witnesses amounts to a conversion or application of the money, part of the revenue of the State, to the use of the defendant, or of some other person. The direct tendency of the testimony was to show that the defendant, acting for and representing the auditor in his official capacity, received national currency—either legal tender treasury notes of the United States, or notes of national banks; that he appropriated one hundred and eighty dollars of the same, and substituted therefor, and paid into the treasury, the same amount, one hundred and eighty dollars, in State obligations, worth at that time in the market considerably less than the national currency he received.

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition, or the exclusion of the owner's rights.—Bouvier's Law Dic. title *Conversion*; see 1 Addison on Torts, 393; *Moody v. Keener*, 7 Por. 218; *Daniel v. Thompson*, 13 Ala. 440; *Glaze v. McMillan*, 7 Por. 279; 2 Brick. Dig. 486, §§ 36, 37, 43.

We do not understand the appellant—defendant in the City Court—as seriously controverting this general proposition. He takes the position that section 14 of the funding act (Pamph. Acts 1873, p. 46), makes special provision for the act shown in this evidence, and thereby segregates this offence from the general provisions of the acts of 1868 and

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1875, copied above. The material provisions of the section of the act of 1873 referred to, are as follows:

"Section 14. That it shall be the duty of every collector of taxes, and every receiver of public moneys in this State, to keep and faithfully pay into the treasury, or to the depository appointed by law for the keeping of the public money, the identical money received by him or them from the taxpayer or tax-payers; and it is hereby made unlawful for any person or officer of this State to use or apply any portion of the money paid him in the course of his official duty, as collector of taxes, or receiver of any part of the State revenue, to any other use or purpose than payment into the treasury, in the manner and form in which such money was so received by him. And when any collector of taxes in this State, or any person who is by law authorized to collect and receive any part of the State revenue, receive in payment of any taxes, licenses or public dues, any of the obligations issued under the authority of this State, he shall, in a proper book, make an entry of the obligations received by him, and the date of such receipt, which date and entry shall correspond with the date of the receipt given to the payer of taxes from whom such obligation was received; and such collector of taxes, or receiver of the State revenue, shall produce said book to the auditor of the State at the time when his account is audited and adjusted, in default of which entry, or production of said book, such obligation or obligations shall be received by the treasurer for the amount only of the principal thereof, without interest."

Many provisions of this statute, and notably those after mentioned, show that the testimony in the present record does not make a case that falls within its provisions. It is the *money received from the tax-payer* this statute requires to be kept and paid into the treasury. The collector is to make an entry in a proper book, when he collects in State obligations, and *shall produce said book to the auditor of the State at the time when his account is audited and adjusted*. These clauses show that the statutory offence it denounces, can be committed only by the conversion or unauthorized application of money which the officer proceeded against, himself collected from the tax-payer, and whose account it is the duty of the auditor to audit and adjust.—See *Smith v. Speed*, 50 Ala. 276.

Since the introduction and free use of bank notes and treasury notes as a circulating medium and standard of value, they are as readily understood as being embraced in the

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generic term money, as is the authorized coin of the country. *Haynes v. Wheat*, 9 Ala. 239; *Corbett v. The State*, 31 Ala. 329; *Grant v. The State*, 55 Ala. 201.

We have many statutes which employ the general designation money, which, in their construction, would force us to hold that the word embraces every species of lawful circulation which passes from hand to hand as money.—See Revenue Law of 1868, § 6, subds. 19, 20, 21; Revenue Law of 1875, § 5, subds. 18, 19, 20. In the fourteenth section of the funding act of 1873, which it is contended this case falls under, it is clear that the term money is employed in the generic sense above expressed. See, also, Code of 1876, sections 4261 *et seq.* 4373, 4377 *et seq.* Section 4811 of the Code of 1876, applying, as it does, expressly to embezzlement, lays down a rule which we think should govern in all cases of indictment for that offence; and under the general name, money, proof should be received of any lawful circulating medium, which usually circulates as money.

While we have declared above that the substitution for National currency of State obligations, alleged to have been made by defendant, was a conversion by him, yet, every change of the money collected into other funds, of the same class, or of equal or greater value, would not necessarily be within the spirit of the statute, or punishable as a conversion. But when the money received is appropriated by the collector or receiver, and its place supplied by another circulating medium, or other commodity receivable in payment of taxes, but of less value than the money thus received and appropriated, a case is made which falls directly within the letter and spirit of the statute. Whether that which was substituted was equally or less valuable than the money received and appropriated, is a material inquiry in the trial of every such prosecution; for it tends to show the motive of the exchange. The City Court did not err in receiving proof of the value at which State obligations were held, or were convertible, at the time of the exchange.

For the defect in the indictment, pointed out above, the judgment of the City Court is reversed and the cause remanded. Let the defendant remain in custody until discharged by due course of law.

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Keeping a Disorderly House.

1. *An arrest of judgment is made only on matters of record.*—A motion in arrest of judgment must be founded on matters appearing of record. Errors which the court may commit in the progress of the trial, which is not necessarily shown by the record, may be the matter of an exception or ground of a motion for a new trial, but not of a motion in arrest of judgment.

2. *A common law indictment is valid under the Code.*—An indictment good at common law for a common law offence, is sufficient under our statutes.

3. *The intendment of an indictment as to venue must be sustained by proof.*—It is an intendment, or implication of law that the offence stated in any indictment was committed in the county in which the indictment is found; but a failure on the trial, to support by evidence the intendment or implication, is fatal.

4. *A peremptory challenge is not allowed after juror has been accepted by both parties.*—A peremptory challenge of a juror will not be allowed after the solicitor and the defendant have each expressed satisfaction with the jury as organized. But a challenge for cause may be permitted, if the cause existed and was not sooner discovered or improperly withheld.

5. *The opinion of a witness as to the character of a house is not legal evidence.*—If, on the trial of a person indicted for keeping a bawdy-house, it is proven that the house is frequented by persons of dissolute habits, and its inmates are reputed to be lewd, it is permissible to show that the character of the defendant for chastity is bad. But the opinion of witnesses that the house is a bawdy-house, or a nuisance, is not admissible as evidence.

6. *The judge must pay strict attention to the evidence.*—It is the duty of a judge, both in civil and criminal cases, to give strict attention to the evidence; and to propound to the witnesses such questions as he may deem necessary to elicit any relevant and material evidence, without regard to its effect upon the interests of either party; the development and establishment of the truth is his purpose and duty.

7. *The questions of a judge or juror should arise out of the evidence.*—The questions a judge, or juror, propounds to witnesses should be such as are suggested by the evidence given on trial.

8. *The judge should not converse with witnesses privately.*—It is not within the province of a judge to converse privately, either in or out of court, with a witness, to ascertain whether he has knowledge of particular facts; or to suggest to the witness, after his examination, that there are facts, other than those to which he has testified, within his knowledge.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

At the spring term, 1875, of the Circuit Court of Talladega county, the defendant was indicted for keeping a disorderly house. To this charge the defendant pleaded not guilty.

When the case was called and was ready for trial, the court

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directed it to be tried by one of the panels of regular jurors, that had been impanelled and sworn to serve for the week. In the jury-box was seated a juror named Benjamin W. Nunis. The court asked the solicitor if he was satisfied with the jury? He replied, "he was." The defendant was then asked if she was satisfied with the jury, and replied by challenging three jurors. But Nunis still remained in the jury-box. The places of the challenged jurors were supplied, by calling three jurors from the other panel that had also been sworn to serve for the week. To the question of the court, the solicitor of the State answered, he was satisfied with the jury. The defendant made the same reply. But just before the indictment was read to the jury, the solicitor asked permission to challenge the said Benjamin W. Nunis, who was one of the jurors that had been accepted. To this action the defendant objected; but the court overruled the objection, and the defendant excepted. The solicitor then challenged Nunis peremptorily; and the defendant excepted. One Thomas W. Curry was put in the place of Nunis. To this action the defendant objected; but the objection was not sustained, and the defendant excepted. Curry was not challenged by either party.

A witness was introduced by the State, and asked if he knew the general reputation of the defendant for chastity?

He replied that he did. The solicitor then asked whether the reputation of the defendant was good or bad. He answered, it was bad. To each of the foregoing questions and answers, the defendant objected; the objections were disallowed, and the defendant excepted.

The witness also testified, that the house occupied by the defendant had the reputation of being a house of ill-fame. To this evidence the defendant objected; the objection was not sustained, and the defendant excepted.

One Wood was then introduced and examined by the State. The defendant declined to cross-examine him. When he was retiring from the stand, the "presiding judge beckoned to him, that he wished to speak with him." The witness approached, and "got up and leaned over the judge's stand," and some words were exchanged between the witness and the judge in a whisper. What was said, was not heard by any member of the jury, or by the defendant, or by her counsel. The court then told the witness if he knew any fact or circumstance, not already stated, that would tend to show the character of the defendant, or that of the house, to state it. The defendant objected to the question; the objec-

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tion was overruled, and the defendant excepted. The witness then answered, that "he had reason to believe that his son was in the habit of visiting the house of the defendant; and on one occasion he and his wife saw their son going to the house of the defendant, and that his wife went there to get their son away; that witness followed her, and while standing at the gate near the house, he heard loud and angry talking in the house of defendant between his wife and some one in the house." To this evidence the defendant objected; her objection was overruled, and she excepted.

On the cross-examination of one of the State's witnesses, who was a policeman, the defendant "proposed to prove that when the witness told the defendant he came to her house, by reason of her message, to remove persons making noise, that she said the persons making noise were doing so against her consent, and that she wanted to be relieved of the persons and the noise they were making." The solicitor objected to such proof; the objection was sustained, and the defendant excepted.

The court, after giving a charge requested by the defendant, said that "all the statements contained in the indictment need not be proven, in order to find the defendant guilty; all that is necessary to be proven, is enough to make out the offence charged." To this the defendant excepted.

The jury retired and returned, and, in reply to a question asked by the foreman, the court said, "that if they believe, from the evidence, that the defendant kept a house at which she permitted people of different sex to meet and have illicit intercourse; and that it was in such an open and notorious manner as to affect the morals of the people about where the house was situated, and that it affected the morals of the young men, the defendant would be guilty as charged." To this the defendant excepted.

The jury returned a verdict against the defendant, of guilty, as charged in the indictment. Thereupon, the defendant made a motion "to set aside the verdict and judgment" and "arrest of judgment, on the following grounds:" *First*, the court erred in its charge, and in the admission of evidence; *second*, the verdict of the jury was against the weight of evidence; *third*, that Curry, "one of the jurors who tried the case, was not a regular juror for the week, or a tales juror for the day, or a juror in this case; *fourth*, the court erred in permitting the State to challenge the juror Nunis after he had been accepted by both parties; *fifth*, the court erred in consulting with the witness Wood after the defendant

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had declined to cross-examine him, and then in examining him; *sixth*, the indictment is deficient, because it does not contain an indictable offence, and contains facts and conclusions which are parts of different offences; and does not identify the offence as to locality, as required by law."

The motion "was, in all things, overruled."

JOHN T. HEFLIN, for appellant.—The juror Nunis having been twice accepted by the State, and then by the defendant, could not be challenged for cause, and a *fortiori* could not be challenged peremptorily.—3 Stewart, 454; 2 Ala. 275; 28 Ala. 25.

The admission of evidence proving the general reputation of the defendant for chastity, and the reputation of her house as a house of ill-fame, was an error. The indictment under which the defendant was tried, is for keeping a disorderly house, and not for keeping a brothel. While it is true that all bawdy-houses are nuisances, it is not true that, in law, all disorderly houses are brothels. Therefore, the evidence should not have been admitted. This is true, even if defendant had been indicted for keeping a brothel.—55 Ala. 217; *Nan Toney v. The State*, present term.

It was an error for the judge to renew the examination of the witness, after it had been closed by the solicitor. The question asked was illegal.—Authorities *supra*.

The court erred in permitting the witness Wood to testify to the motive of Mrs. Wood in going to the house of the defendant, which he could not know.—36 Ala. 120; 9 Ala. 875; 8 Ala. 647; 5 Ala. 546.

There is error in the refusal to give the charge asked by the defendant, and in the qualification of the charge given by the court.—43 Ala. 45; 52 Ala. 328, *et seq.*

The charge given by the court in response to the inquiry of the juror, is abstract. The defendant was not indicted for keeping a brothel. The additional charge, that all houses of ill-fame are injurious to the morals of young men, does not correctly state the law of the case.

The charge that the reputation of the house could be considered by the jury as evidence on which to base a conviction, is an error.—55 Ala. 217.

The motion in arrest of judgment should have been sustained, because the indictment was insufficient; because it did not allege the house was kept for lucre or gain, and because it does not state the locality of the house.—2 Bish. Cr. Pro. § 231.

[Sparks v. The State.]

JOHN W. A. SANFORD, Attorney-General, *contra*.

PER CURIAM.—1. A motion in arrest of judgment must be founded on matter appearing of record. Because of matter extrinsic, it is not granted.—*Williamson v. Br. Bank Montgomery*, 3 Ala. 504. Errors which the court may commit in the progress of the trial, in the admission or rejection of evidence, or in instructions given or refused, or in reference to any matter, which is not necessarily shown by the record, may be the matter of an exception, or ground of a motion for a new trial, but not of a motion in arrest of judgment. We pass over all the grounds assigned for the arrest of judgment, except the two relating to the sufficiency of the indictment. The indictment conforms substantially to the form given by Archbold, for the common law nuisance of keeping a bawdy-house. The only material departures are, the omission to charge the locality of the house and that it was kept for *lucre and gain*. The allegation that the house was kept for *lucre and gain*, was regarded as unnecessary in the common law indictment.—2 Bish. Cr. Pr. § 108. An indictment good at common law, for a common law offence, is sufficient under our statutes. An averment of the particular parish in which the house was situate, was contained in the form of indictment at common law; and according to some authorities, the averment when made, was matter of description, which must be precisely proved. Whether it was a necessary averment, on authority, it is difficult to say. The offence is not defined by statute—it remains a common law misdemeanor—nor is the punishment particularly specified. On conviction, the only punishment is a fine, not exceeding five hundred dollars, to which imprisonment, or hard labor for the county, for a time not exceeding six months, may be added.—Code of 1876, § 4447. There occurs to us no sound reason for requiring an averment of the particular locality of the house, except as a statement of the venue of the offence. The statute dispenses with allegations of venue; requiring that on the trial it should be proved.—Code of 1876, § 4787. It is an intendment, or implication of law, that the offence stated in any indictment was committed in the county in which the indictment is found; a failure on the trial, to support by evidence the intendment, or implication, is as fatal, as if the averment of venue, was positive and precise.

2. The juror Nunis was of the regular panel which was in the jury-box when the cause was called for trial. If he was subject to challenge for cause, it is not disclosed by the

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bill of exceptions. A peremptory challenge came too late, after the solicitor and the defendant had each expressed satisfaction with the jury as organized. A challenge for cause, if it had been satisfactorily shown, the cause existed in fact and was not sooner discovered, nor improperly withheld, would not have been too late.—*Smith v. State*, MSS.

3. Accompanied by evidence, (which appears to have been given) that the defendant held herself out, as having control over, managing and keeping the house, and that it was frequented by persons of dissolute habits, and that the reputation of its inmates for chastity was bad, it was permissible to show that the character of the defendant for chastity was bad. But it was not permissible to prove that the reputation of the house, was that of a house of ill-fame.—*Wooster v. State*, 55 Ala. 217; *Nan Toney v. State*, MSS. Nor is the opinion of witnesses that the house is a bawdy-house, or a nuisance, admissible as evidence.—*Smith v. Commonwealth*, 6 B. Mon. 21.

4. It is the duty of a presiding judge, in all cases, civil or criminal, to give strict attention to the evidence. And it is also his duty, to propound to the witnesses such questions as he may deem necessary to elicit any relevant and material evidence, without regard to the effect of such evidence, whether it may benefit or prejudice the one party or the other—the development and establishment of the truth, is his purpose and duty. But we cannot regard it as within his province to converse privately, either in, or out of court, with a witness, to ascertain whether he has knowledge of particular facts; or to suggest to the witness, after his examination, that there are facts, other than those to which he has testified, within his knowledge. A juror would not be allowed to call a witness to him, and privately inquire as to his knowledge of facts, and then so shape his questions as to elicit the facts of which he had made inquiry. The questions a judge, or a juror, propounds to a witness, should be such as are suggested by the evidence given on the trial. We would hesitate to affirm any judgment of conviction, supported by evidence elicited from a witness, on an examination by the presiding judge, after a private inquiry of the witness, by the judge, as to his knowledge of the facts of the case. Especially, if as in this case, the witness had been examined in chief for the State, and the defendant had declined to cross-examine him, before the inquiries and examination of the judge. We do not impute, or intend to impute intentional impropriety to the presiding judge. We

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are compelled to deal with facts, as they are presented by the record.

5. The evidence elicited from the witness was wholly illegal, and the objection to its admissibility should have been sustained. It had no tendency to prove the offence with which the defendant was charged. The witness may have had many good reasons for objecting to the visits of his son to the house of the defendant, other than that it was a house of the kind charged in the indictment, and so may his wife. Nor was it permissible for the witness to state that *he had reasons for believing* his son was in the habit of visiting the house. Those reasons may have been, and probably were, all founded on hearsay. Nor was there shown any fact, with which the frequency of the son's visits was connected, which tended to show the character of the house.

6. Disturbance of the public peace is not an essential element of the offence charged against the defendant.—*Commonwealth v. Garnett*, 1 Allen, 7. The defendant may not have consented to any such disturbance, and on its occurrence, may have employed all the means at her command to prevent or to suppress it, yet, if she kept a house for prostitution, frequented by lewd persons of both sexes, the offence is complete. The court did not err, in rejecting the evidence proposed, of her applications to the civil authorities to suppress disturbances on the premises. The fact of such disturbances, was of more or less weight against her, dependent on their cause and frequency, and the character of the persons engaged in them.

7. The evidence of the witness Wood was irrelevant. The character of the conversation he heard is not shown, nor any fact which in the least affects the fame of the house or of the defendant. No higher duty rests on the court, than the exclusion of evidence wholly irrelevant. The party against whom it is offered, can not be supposed to anticipate its introduction, and be prepared to explain or contradict it. Nor can its effect on the jury be known, or removed certainly; and its tendency is to distract their attention from the real issues, and the material, relevant evidence.

It is not necessary to notice any other question presented by the record. The judgment is reversed, and the cause remanded, but the defendant must remain in custody until discharged by due course of law.

[Henderson v. The State.]

Henderson v. The State.

Playing Cards at a Public Place.

1. *The words "device" and "substitute" have different meanings.*—The words "device" and "substitute," used in section 4207 of the Code, do not have the same meaning; hence a charge directing the acquittal of the defendant on trial, unless the jury were satisfied he played with the means specified in the statute only, is properly refused.

2. *A point near a public road is a public place.*—A place in the bushes on the edge of an old field in the corporate limits of a town, about forty yards from a public road, and near and in view of a path used by children going to school, and other persons, is a public place within the meaning of the statute against gaming.

3. *The fact of gaming must be ascertained by the jury.*—When it is proven that the defendant and his companions, holding cards in their hands, were sitting on the ground at a place where they had frequently played cards, it is for the jury to determine from the facts whether or not the defendant was playing.

APPEAL from the Circuit Court of Escambia.

Tried before the Hon. JOHN K. HENRY.

The defendant was indicted for playing cards at a public place in the county of Escambia, and pleaded not guilty.

The proof showed that during the winter of 1876-7, the defendant was frequently seen playing cards in the woods, near a path which "led from the town of Brewton to Burnt Corn creek, and to a neighborhood across the creek." The path was "used by children going to school," as well as by other persons. The place where the playing occurred was in full view of persons passing along the path, and was not more than forty or fifty yards from the public road. He and his companions, holding cards in their hands, were seated on the ground in the edge of an old field, and were visible both from the path and the public road.

The defendant asked the following charges, which were in writing:

"That unless the evidence shows beyond a reasonable doubt that the defendant played at cards, or dice, or some device for cards, or dice, he cannot be convicted.

2. "A game with cards would not be complete, if the evidence shows that the parties were merely handling the cards; and when this is all that the evidence shows was done, it devolves upon the State to show that a game was

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played, and the jury can not infer that they did play at such game, in absence of testimony to that effect.

3. "The statute denounces the playing at a game with cards at an out-house, where the people resort, but it does not denounce the playing at a game with cards at an out-place other than a house, if not within itself a public place, although it may be a place to which people sometimes resort."

4. "Although the plank-walk and place resorted to for the purpose of answering the calls of nature testified about in the case is a public place, yet the jury must be satisfied beyond a reasonable doubt, from all the evidence in the case, that the playing, if they believe there was a playing of cards by the defendant, was in view of this place, and could be seen by persons who resorted to this place, so made public by being resorted to."

5. "That the fact that the defendant was seen by one or two persons, playing cards in the woods, does not constitute the place of playing a public place."

Each of the foregoing charges was refused by the court; and to each refusal the defendant separately excepted.

In giving a charge asked by the defendant relative to the publicity of the place, the court said: "I give you the charge, gentlemen, but say to you in explanation, that if the people of the town were in the habit of travelling along the path or visiting the place designated as referred to, then this would be an appropriation of it by the town, and it became a public place by the people thus resorting to it, or if it was in full view of the public road, then to play at cards there would be a violation of law."

To this explanatory charge, the defendant excepted.

JAS. M. WHITEHEAD, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

MANNING, J.—The indictment in this cause, charged defendant with playing "at a game with cards or dice, or some device or substitute for cards or dice, at a tavern, . . . or in a public house, highway, or some other public place," &c. And after the evidence was introduced and the jury had been charged by the judge, defendant asked the court to instruct them, "that unless the evidence shows beyond a reasonable doubt, that the defendant played at a game with cards or dice, or some device for cards or dice, he can not be convicted."

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The indictment says, "with cards or dice, or some device or substitute for cards or dice;" and this is according to the statute. In compiling the Code, brevity was consulted; and it is not to be presumed that any words not needed to express the intention of the law-makers are used in its sections. They did not, it appears, consider the words "device," and "substitute" as meaning the same thing; though in the section under consideration (section 4207 (3620) of the Code of 1876), they both seem to have very nearly the same signification.

A "device" is defined to be, "that which is devised or formed by design, a contrivance, an invention."—*Webster*. A substitute is that which is put in the place of another thing, or used instead of something else. As used in the statute, *device* seems to have a somewhat more narrow meaning than *substitute*. The latter word would embrace whatever might be used in place of cards or dice, whether designed or invented for that purpose, or not. Supposing the legislature considered that there was some such distinction between the things the two words were meant to express, we feel obliged to hold that the court did not err in refusing to give a charge from which one of them was excluded.

The second charge asked and refused was properly refused. The court by giving it would have invaded the province of the jury. It was for them to determine whether persons handling cards as defendant was represented as doing in company with others, was playing at a game with cards or not.

The place described by the testimony as that in which the playing was done, if the jury believed the evidence concerning it, was certainly a "public place," within the meaning of the statute: and charges three, four and five, that were asked and refused, could have had no other effect than to confuse the jury or mislead them. There was, therefore, no error in refusing to give them. Nor was there any error in giving the explanatory or additional charge, to which defendant excepted.

Let the judgment be affirmed.

[McAdory v. The State.]

McAdory v. The State.*Arson.*

1. *A witness can not testify as to the appearance of the prisoner.*—Evidence that the prisoner “looked downcast” expresses merely the opinion of the witness, and is inadmissible.

2. *A charge stating circumstances tending to show guilt, should also state those which may explain them.*—Where the testimony tended to show the indisposition of the prisoner, a charge by the court that, if defendant was within four hundred yards of where the gin-house was burned, and was advised of the burning and did not go and aid others in saving property that might be saved from the fire, the jury might look to that fact as a circumstance, with other evidence tending to show his guilt, is objectionable, because it did not refer to his alleged indisposition.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. JOHN HENDERSON.

An indictment was found against the defendant, at the spring term, 1877, of the Circuit Court of Coosa county, for the crime of arson. To this indictment the defendant pleaded not guilty.

About midnight, of a day in December, 1876, the gin-house of one P. J. McAdory, who lived in Coosa county, was burned. The next morning he accused the defendant of burning the house. The defendant denied that he had done so. To a question asked at the time, why he had not aided in putting out the fire, the defendant replied, “that he had started, but was so sick he had to go back.” The witness introduced by the State was then asked “how the defendant looked?” To this question the defendant objected, but his objection was overruled by the court, and the defendant excepted. The witness answered that he “looked downcast.”

The defendant had attended a meeting, distant from the gin-house about three-quarters of a mile, and while at the meeting complained of sickness, and did so on his way home. In company with others, the defendant left the church and went with his companions to the house of Wiley Corbin. Then he again complained of being sick, and laid down on a bed. He was at the house of Wiley Corbin when the alarm of fire was given, and, with others, “started to the fire, but complained of being sick and returned.” Corbin’s house was three or four hundred yards from the gin-house. There

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was evidence tending to show the defendant was not at the house of Corbin until the gin-house was on fire.

The court charged the jury, among other things, "that if the evidence satisfied them that the defendant was within four hundred yards of where the gin-house was burned, and was advised of the burning, and did not go and aid others in saving property that might be saved from the fire, the jury might look to that fact as a circumstance, with the other evidence, tending to show his guilt." The defendant excepted to this part of the charge.

Among other charges, the defendant asked, in writing, the following:

1. "The mere fact that the prosecutor testified that he lived in Coosa county, had a gin-house burned, and that the gin-house was one hundred and fifty or two hundred yards from the prosecutor's house; that this is not sufficient, without further, to show said gin-house was situated in said county of Coosa, and if this is all the evidence tending to show the gin-house was situated in Coosa county, then they must find the defendant not guilty.

2. "That if the jury believe, from their own experience, that there was generally, on such occasions, a disposition on the part of white men to impose extraordinary hard labor on the black men, and if they believe, from the evidence, the defendant was sick on the night of the burning, then they may consider this to explain his failure to go to assist in preserving the property at the gin-house.

3. "That the jury can not capriciously disregard the evidence of any witness, but they may look to the fact that P. J. McAdory publicly offered a reward of one hundred dollars, and that other parties offered amounts for evidence to convict the party who burnt his (McAdory's) gin-house, in order to determine the credit of the witness, Lewis Norwood, and if they believe this witness was moved to give evidence by the offer of money, then they may look to that fact to determine whether or not said witness is entitled to credit."

The court refused to give these charges; and to each refusal the defendant separately excepted.

S. J. DARBY and F. L. SMITH, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—Evidence that the prisoner looked "down-cast," was but the opinion of the witness, and should not have been admitted.—*Johnson v. The State*, 17 Ala. 618, 625; *Gassenheimer v. The State*, 52 Ala. 313.

[Ozeley v. The State.]

That part of the general charge which stated "if defendant was within four hundred yards of where the gin-house was burned, and was advised of the burning, and did not go and aid others in saving property that might be saved from the fire, the jury might look to that fact as a circumstance, with the other evidence, tending to show his guilt," is objectionable, in not referring to the alleged indisposition of the prisoner. There was testimony that prisoner complained of being sick. If the jury did not disbelieve this complaint of his, then it was a circumstance calculated to excuse him for not going to the fire. The truth or falsity of the excuse was a question for the jury; and the charge we are commenting on is faulty, in withholding that feature of the evidence from the jury. The charge would have stood above criticism, if it had contained a clause similar to the following: "provided he was in such state of health as to show his presence and assistance would have been of service, without material injury to himself."—*Martin v. Hill*, 42 Ala. 275; *King v. Pope*, 28 Ala. 600.

Charges on the subject of venue will not probably arise again in their present form, and we need not consider them.

The second charge asked predicates a fact, of which no evidence is found in the record. This constitutes it abstract. 1 Brick. Dig. 338, §§ 40, 41.

The third charge asked should have been given.

We find no other error in the record.

The judgment of the Circuit Court is reversed and the cause remanded. Let the prisoner remain in custody until discharged by due course of law.

Ozeley v. The State.

Forfeited Recognizance.

1. "*Approved*" need not be endorsed on undertaking of bail.—An undertaking of bail conforming substantially to the requirements of the statute, is not void because the officer taking it does not endorse thereon "*approved*," and sign such endorsement. Such an endorsement is not the only evidence of the acceptance of the undertaking. It may be proven by other competent evidence.

2. *The acceptance of the bail shows its approval.*—Evidence that the undertaking was signed in the presence of the magistrate; that he took possession of it and discharged the principal from custody, and the undertaking is sub-

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sequently found on file in the court to which it binds the principal to appear, is as satisfactory evidence of the approval and acceptance of the undertaking as its endorsement in the most formal manner.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

The defendant, W. T. Ozeley, William Ozeley, and James M. Reynolds, entered into an undertaking of bail. Its condition was that the said W. T. Ozeley, *alias* Thomas Ozeley, then in custody, should appear at the next term of the Circuit Court of Talladega county, to answer the charge of burglary. He failed to appear at court. Thereupon a judgment *nisi*, on motion of the solicitor, was entered against the said Thomas Ozeley, and William Ozeley, and James M. Reynolds, sureties of the said Thomas Ozeley, and a writ of *scire facias* "was ordered to be issued to them, to show cause at the next term of the court why the said judgment *nisi* should not be made absolute and final." The writ of *scire facias* was issued, and was executed on the said defendants.

At the fall term, 1877, of the said Circuit Court, the cause being called for trial, the solicitor moved the court to make final the judgment *nisi* which had been rendered in this cause at a previous term of the court. Whereupon the defendants craved *oyer* of the bond, and *scire facias* in this cause, which was read, as follows:

"The State of Alabama, Talladega county. We, Thomas Ozeley, William Ozeley, and James M. Reynolds, his sureties, acknowledge ourselves indebted to the State of Alabama in the sum of five hundred dollars, to be void if Thomas Ozeley appear at the next term of the Circuit Court of said county, and from term to term until discharged, and answer the charge of burglary preferred against me, Thomas Ozeley.

"Given under our hands, this, 11th day of September, 1875.

"W. T. OZELEY, [SEAL.]

"WILLIAM OZELEY, [SEAL.]

"JAMES M. REYNOLDS, [SEAL.]

"by William Ozeley."

"The State of Alabama, Talladega county. To Thomas Ozeley, William Ozeley, and James M. Reynolds: You are hereby notified that at the fall term, 1875, of the Circuit Court of said county, a judgment was rendered against you, of which the following is a copy:

"*The State of Alabama v. Thomas Ozeley.* Indictment for burglary. It appearing to the court that the said Thomas

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Ozeley, together with William Ozeley, and J. M. Reynolds, agreed to pay the State of Alabama five hundred dollars unless the said Thomas Ozeley appeared at this term of the court to answer in this case, and the said Thomas Ozeley having failed to appear, it is therefore ordered that the State of Alabama, for the use of Talladega county, recover of the said Thomas Ozeley, William Ozeley, and James M. Reynolds, on said undertaking, the sum of five hundred dollars, unless they appear at the next term of the court, and show cause why this cause should not be made absolute.'

"You are, therefore, hereby notified that said judgment will be made absolute against you at the next term of said court, unless you then appear and show cause against the same.

"Witness my hand, this the 25th day of October, A. D. 1875,

"J. H. COKER, Clerk."

"Executed by serving copy on each of the within named defendants, December 30, 1875.

"F. A. NELSON, Sheriff."

The defendants then moved to quash the *scire facias* and bond, on the following grounds:

1. "Because what purports to be said bond was not approved by the magistrate before whom the preliminary trial was had. 2. Because what purports to be said bond is not an undertaking of bail, entered into under the statute, and approved by an officer authorized to take it. 3. Because what purports to be said bond can not be enforced by *scire facias* on a judgment *nisi*, as upon a forfeited undertaking of bail, properly entered into under the statute for that purpose." The court overruled the motion to quash, and the defendants excepted.

The State introduced a witness, who testified "that he was present at the preliminary trial, and that the parties signed the bond, which was written by the magistrate, in the presence of the magistrate, and the magistrate turned defendant loose upon said bond." Whereupon the court proceeded to make the said judgment final, and the defendant excepted.

GEORGE W. PARSONS, for appellant.—The whole law upon the undertaking of bail is in the Code. It directs when bail shall be allowed; how it shall be allowed; by whom it shall be taken, and the manner of its approval.—Code, § 4847. It requires every undertaking of bail to be in writing, signed by the defendant and at least two sufficient sureties, and

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approved by the magistrate, or officer taking the same, and expressed in a certain set form of words. No deficiency in these particulars can be helped by parol-proof.—*Dover v. The State*, 45 Ala. 244; *State v. Whitley*, 40 Ala. 728; *Gray v. The State*, 43 Ala. 41.

The bond is not a statutory bond, and can not be enforced by *certiorari*.—Form in Code, p. 1001; 45 Ala. 244.

JOHN W. A. SANFORD, Attorney-General, *contra*.

BRICKELL, C. J.—The taking of bail is defined by statute, as the acceptance by a competent court, magistrate, or officer, of sufficient bail for the appearance of the defendant according to the legal effect of his undertaking, or for the payment to the State of a certain specified sum if he does not appear.—Code of 1876, § 4841. When not taken in open court, the *undertaking* of bail must be in writing, signed by the defendant and at least two sufficient sureties, and approved by the magistrate or officer taking the same; and may be substantially in the form given by the statute. Code of 1876, § 4847.

The undertaking entered into by the appellants was taken by a competent magistrate, and conforms substantially to the statutory form, except that the magistrate did not endorse on it the word *approved*, and sign such endorsement. The only effect of the endorsement, if made, would have been as evidence of the fact that the magistrate had accepted the bail. There is no indication in the statute of a purpose to make such endorsement the exclusive evidence of this fact, and if the fact is controverted, any other satisfactory and legal evidence is admissible to prove it. Evidence that the undertaking was signed in the presence of the magistrate, and that on its execution he took possession of it and discharged the principal from arrest, when the undertaking is found subsequently on file in the court to which it binds the principal to appear, is as satisfactory evidence of the fact, as the endorsement would be, if it had been made in the most formal manner.

The judgment is affirmed.

[Presley v. The State.]

Presley v. The State.

Placing Obstructions on a Railroad Track.

1. *Death caused by an obstruction wrongfully placed on a railroad track is murder.*—If a train of railroad cars is thrown from the track by obstructions wrongfully placed upon it, and a human being is killed, the person committing the act is guilty of murder in the first degree.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

The defendant was indicted at the spring term, 1878, of the Circuit Court of Butler county, for the offence of placing obstructions on the railroad track. He pleaded not guilty.

A freight train on the Mobile and Montgomery Railroad left Montgomery for Mobile on Saturday night before Christmas, 1877. When it arrived at a point north of the city of Greenville, and distant from it between two and three miles, it encountered an obstruction on the track. It "consisted of a cross-tie lying across the track of the road and two iron bars parallel with it. The two ends of the iron bars, which rested on the cross-tie, were elevated more than five inches, and pointed towards the north, from which direction the train was coming when it struck the impediment."

The State introduced a witness, who testified "that he first saw the defendant, on the fourth and sixth of last January, in the town of Greenville; that he was sent to inquire into the truth of a confession reported by one Bob Payne to have been made by the defendant; that he met the defendant in some woods near the railroad, and that the defendant made a confession to him; that no inducement or offers of reward were made to defendant, or any threats made against him, within his (witness) knowledge."

The defendant objected to any testimony of a confession by him, unless the State should first show that no inducement or threats were made by said Bob Payne. The court overruled the objection, and the defendant excepted. The witness then stated that the defendant told what he had placed on the road, in what manner he did it, "and took a stick and demonstrated how he placed said obstruction."

By consent of the defendant, the written testimony of Bob

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Payne, taken down at a preliminary investigation, was introduced by the State. This is his evidence :

“ Witness states that he lives in Montgomery ; became acquainted with Jake Presley on the 30th of last month, and that the prisoner made a confession to him, on the railroad, on the 30th of last month, without any threats or inducements. Witness told prisoner that he had a brother in this neighborhood by the name of Joe Payne, who was a carpenter ; that he wanted to get in with some good colored man, to do some business, and if the prisoner was a white man’s negro he wanted to have nothing to do with him ; to which the prisoner replied, that he was known in the community, and would do to trust. Witness then told prisoner that he and his partner, a white man, had thrown the train off the track in Georgia, and got some goods, and wanted to start a grocery here ; that he had lost a box of goods, worth one hundred and seventy-five dollars, on this railroad, but was afraid to say anything about it, but wanted to get even with it. To which the prisoner replied, that he was right ; that these white folks were hell in Greenville, and would go to telegraphing and pick them up. Witness said, we want to get even with the railroad, and asked the prisoner where would be a good place ? To which he replied, down here in the swamp, north of where they were then standing, three miles from Greenville. Witness asked prisoner how he knew ? Prisoner said, because he had tried it. Witness asked if he had made anything. Prisoner said, he had not. Witness said to prisoner, probably he did not fix it right, and asked how he did it ? To which prisoner said, and demonstrated by making two marks representing the track and cross-ties representing the bed of the road, that he laid a loose cross-tie against one rail of the road and butting against the rail, and laid the other end on the opposite iron rail ; that he embedded the end of the cross-tie between two cross-ties in the bed (but did not put it deep enough, and the ‘cow-catcher’ threw it off), and placed another loose cross-tie parallel with the road, but can’t remember the exact position. Witness asked prisoner where he was going ? Prisoner said he was going home. Witness stated he was going to town to get a drink, and asked the prisoner if he wanted to go with him ; to which he said, he would. Witness stated that he was stopping with Bob Norvell. Prisoner asked witness if he had told Norvell his business, saying there were a good many white folks’ negroes about here, and that he would keep him posted, and point them out to him. Witness asked

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prisoner, if he had any partners? He stated that he had had, but the white folks had about cleaned them up. Some had been convicted of stealing guano, sent to Flowers' mill, and escaped from there and went to Lowndes county, were recaptured and had died at the mill. The next morning he carried his satchel to prisoner's house, and told him that his partner was a very particular man, and sometimes people would say they had done things to get in with them, because they were sharp. To which prisoner replied that he would not say he had done a thing unless he had done it. Witness told prisoner he wanted him to come to Greenville to meet his partner, and be introduced to him, and show him what sort of a man he was, and tell him what he had done, who would do to tie to, and show them where would be a good place to throw the train off the track, and get even; and the prisoner came to Greenville with that understanding, but the parties whom they expected to meet did not come that night; but under that agreement the prisoner came again to Greenville the next Thursday, and met Gus Wright, a policeman from Montgomery, who was the party the witness represented as his partner. They all three met in the back part of a bar-room, in Greenville, where prisoner made another confession, but no inducements or threats were made to induce the confession. Prisoner had a conversation with said Wright before the meeting in the bar-room; and Wright told the prisoner that he believed he had told him a lie, that he had not done what he said he had done, and did not know how to do it. Prisoner replied: I don't know why I should lie; I am under no obligation to you. Wright then said, show me how you did it. The prisoner took two small sticks and demonstrated it as witness has heretofore testified. The prisoner was then immediately arrested by J. R. Porterfield, a policeman of Greenville, who was secreted in the bar-room. In said conversation Wright asked prisoner when he put the obstruction on the road. Prisoner said in Christmas. Wright asked if he could recollect the night? Prisoner reflected awhile, and said on Wednesday night.

“ [Signed.]

his

“ ROBERT PAYNE.”

mark.

The defendant then moved to exclude all of the testimony of the confessions of himself on the ground that they were not voluntary; but the court overruled the motion, and the defendant excepted.

[Brewer v. The State.]

No counsel for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

MANNING, J.—Appellant was convicted of having placed an obstruction on a railroad with intent to wreck a train of cars. His own confessions made to detectives in the hearing of another person, under the impression the detectives were about to co-operate with him in committing another act of the same kind, were given in evidence against him, and are set out in a bill of exceptions taken on his behalf. The objection presented is, that it does not appear that the confessions were voluntary. But it does so expressly appear. And if, as a consequence of the obstruction, any person had been killed, the defendant would have been guilty of murder in the first degree, and liable to be hanged therefor. It would have been a homicide proceeding from that depravity of mind and heart which is technically called “universal malice.”—See *Mitchel v. The State*, opinion by STONE, J., at this term.

The judgment of the Circuit Court is affirmed.

Brewer v. The State.

Bigamy.

1. *Two crimes are punishable under section 4185 of the Code.*—Section 4185 of the Code declares two offences of different elements, but of the same general character, and punishable in the same manner.

2. *Bigamy can be prosecuted only in the county where the marriage was solemnized.*—One of these offences (bigamy) can be prosecuted and punished only in the county in which the unlawful marriage was solemnized; the other is complete and punishable in any county in which the parties “continue to cohabit” after the unlawful marriage.

3. *An acquittal of the former crime does not prevent an indictment for the latter.*—An acquittal of the former of these crimes is no bar to an indictment for the other.

4. *Oral proof of the marriage is admissible.*—Under an indictment for either of the offences declared in section 4185 of the Code, oral proof of the marriage is admissible.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. WILLIAM S. MUDD.

The facts are stated in the opinion.

[Brewer v. The State.]

JOHN J. JOLLY, and PHELAN & CLARKSON, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—The appellant was indicted in Jefferson Circuit Court. The indictment, found by a grand jury of that county, contained a single count, and charged that, “before the finding of this indictment, William Brewer, having a wife then living, unlawfully married one Josephine Garner.” On the trial under the first indictment, testimony was introduced for the State, which showed that the marriage with Josephine Garner was solemnized in Bibb county. Thereupon, the court made the following order: “There being a variance between the allegations in the indictment and the proof, in this, that the indictment charges that the defendant having a former wife then living, married Josephine Garner; and the proof shows that the marriage with Josephine Garner was had in Bibb county, Alabama; and that defendant removed into this county with Josephine Garner, and has continued to cohabit with said Garner in this county; and defendant refuses to consent to an amendment of the indictment—the prosecution is dismissed before the jury retired, and another indictment is ordered to be preferred.”

The grand jury of Jefferson county thereupon returned another indictment into court, containing two counts; the first charging that “William Brewer, having a wife then living, unlawfully married one Josephine Garner—and having so unlawfully married the said Josephine Garner, continued to cohabit with her in the said county of Jefferson and State of Alabama.” The second count charged that said “William Brewer, having a former wife then living, and having unlawfully married one Josephine Garner, continued to cohabit with her in said county of Jefferson and State of Alabama.” To this second indictment so found by the grand jury, the defendant pleaded the proceedings had under the first indictment, above set out, as a former acquittal of the offence charged in the second. The plea is to both counts, and sets out the proceedings *in extenso*. A demurrer was interposed to this plea, which the court sustained.

Both the original and amended indictments are framed under section 4185 of the Code of 1876. In neither of them is any averment of the county in which the alleged unlawful marriage took place. Such averment is not necessary, but on the trial it must be proved that the offence was committed in the county in which the indictment is preferred.—Code of

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1876, § 4787. Under the first indictment no conviction could have been had, for the marriage took place in one county, and the indictment was found in another. But section 4185 of the Code, *supra*, declares two offences of very different constituent elements, although of the same general character, and punishable in the same manner. One of the offences can be prosecuted and punished only in the county in which the unlawful marriage is solemnized. In the other, no matter where the marriage takes place, if bigamous, the offence is complete if the parties thus unlawfully married "continue to cohabit" in the county in which the indictment is found. The first indictment charges one of these offences, of which the defendant was clearly not guilty under the proof. The second indictment charges a different offence; and if there had been a verdict of acquittal under the first indictment, this would have been no bar to a prosecution under the second. It follows, that we need not inquire whether the Circuit Court rightly allowed this case to be taken from the jury, and a new indictment to be preferred. Whether right or wrong, it could not have done the defendant any injury.—Code of 1876, § 4817; *White v. The State*, 49 Ala. 344; *Beggs v. State*, 55 Ala. 108.

The plea was to the whole indictment. The second count of the new indictment describes an offence entirely different from that set forth in the first indictment.

Each of the marriages is proved by persons who witnessed the ceremony, and the first, by the record of the license and marriage. The second marriage, and co-habitation, are proved by many witnesses, some of whom prove confessions of the defendant. There is no charge shown in the record which raises the question of the sufficiency of the proof. If there had been, it would not avail the defendant.—See *Langtry v. The State*, 30 Ala. 536; *Morgan v. The State*, 11 Ala. 289. All the objections and exceptions reserved, were to the introduction of evidence; and generally to the entire evidence given severally by the witnesses. None of it was illegal, even if it were conceded that more testimony was required to justify a conviction. No case can be found which holds that oral proof is not admissible on the question of marriage. Some of them go so far as to hold that confessions alone are not sufficient; but there is positive proof by eye-witnesses of each marriage in this case. There is nothing in this record which requires or permits us to consider the sufficiency of the evidence to support the conviction of the defendant.

[Smith v. The State.]

There is no error in the record, and the judgment of the Circuit Court is affirmed.

Smith v. The State.

Larceny of a Hog.

1. *In one particular the evidence of an accomplice must be corroborated.* To authorize a conviction under an indictment for a felony on the testimony of an accomplice, that part of his evidence which connects the accused with the commission of the crime must be corroborated. But it is immaterial whether or not it is corroborated in other particulars.

2. *The evidence of an accomplice relative to ownership of property is not required to be supported.*—When the testimony of an accomplice, which connects the prisoner with the larceny of property, is corroborated, his evidence relative to its ownership would authorize a conviction although it is supported by no other witness.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The defendant and George Franklin were indicted for the crime of larceny, by the grand jury of Montgomery county, at the October term, 1877, of the City Court of Montgomery. At the next term of the Court a *nolle prosequi* was entered in favor of George Franklin, and he became a witness for the State. He testified "that he was with Tobe Smith, the defendant, on the night of the larceny; that Tobe Smith started to kill a hog in Dr. Nicholson's field, and that he (Franklin) ran off, but came back and found that Tobe Smith had killed the hog, that they cleaned it and that he (Franklin) took a part of the hog," which was alleged in the indictment to be the personal property of J. C. Nicholson.

Dr. Nicholson testified that he had lost a hog, which had been taken from his field in Montgomery county; that no promises, threats or inducements had been held out to the defendant to make any confession; that Tobe Smith then stated he had brought the meat there. He asked Smith about stealing the hog, and Smith told him that on the night before, as he and George Franklin were coming from church, they saw a hog in a field, and that they killed the hog so found, but that he did not know whether the hog was the

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property of Nicholson or not. Nicholson further testified that he could not identify the hog further than that the meat was of the size and description of his hog." He also stated that his name was John C. Nicholson, but he usually signed his name and was known as J. C. Nicholson.

Among others, the following charges were asked in writing by the defendant, viz :

"If the proof of the commission of the offence charged depends alone upon the confession of the defendant and the testimony of the accomplice, corroborated only on that point, they can not find the defendant guilty."

"If the evidence in the case, outside of George Franklin's testimony, as to the ownership of the hog, then they must acquit, and they must be satisfied of such corroboration beyond a reasonable doubt."

These charges were refused by the court, and to the refusal of each charge, the defendant excepted.

No counsel for appellant.

JOHN W. A. SANFORD, Attorney-General, for the State.

STONE, J.—A prisoner may be convicted of a felony on the testimony of an accomplice, if "corroborated by other evidence tending to connect the defendant with the commission of the offence." It is not enough "if it merely shows the commission of the offence, or the circumstances thereof." Code of 1876, § 4895. As we understand this statute, it requires that the corroborative testimony shall tend to connect the prisoner with the commission of the offence; must tend to show that he participated in the commission of the crime.—See *Martin v. The State*, 28 Ala. 71; 1 Greenl. Ev. § 380; *Montgomery v. State*, 40 Ala. 684.

The evidence of the witness, Nicholson, did tend to connect the prisoner with the commission of the offence, and thus fairly presented to the jury the credibility of the accomplice. The statute does not specify any other fact, testified to by an accomplice, which requires corroboration before it will authorize conviction, and we are not authorized to add other clauses to it. The corroboration, extending to this essential, the question of guilt or innocence should be allowed to be passed on by the jury. If, however, there is no corroboration of this essential fact, then a conviction should not be allowed.

None of the charges asked should have been given, accord-

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ing to the rules above declared. The fifth charge seeks to draw a distinction between J. C. Nicholson and John C. Nicholson, the alleged owner of the hog. The witness testified he was called and known by both names. The variance was immaterial.

Affirmed.

Raiford v. The State.

Indictment for an Assault with Intent to Murder.

1. *All persons who aid in the commission of a felony, are principals.*—The Code abolishes the distinction between principals in the first and second degree, and between either of these and accessories before the fact, in felonies; and all persons concerned in the commission of a felony, whether they directly commit the act, or aid and abet its perpetration, although absent, may be indicted, tried, and punished as principals.

2. *The words "aid" and "abet," as used in the Code, are nearly synonymous.*—The words "aid" and "abet," as used in the Code, are nearly synonymous, and comprehend all assistance given by acts, words of encouragement, or by presence actual or constructive. If a person encourages another to commit an assault with intent to murder, or is present for the purpose of aiding the assailant should it be necessary, he may be tried and convicted as principal.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JAMES Q. SMITH.

The defendant, and Walter Raiford (who was not tried), were indicted at the Spring term, 1878, of the Circuit Court of Lowndes county, for an assault with intent to murder Granville Stocks. Neither the defendant nor Walter Raiford knew Stocks, and first met him at the house of a common acquaintance on the night of the difficulty. Some time after their arrival at the house, where a large number of persons had assembled, Granville Stocks entered, and a quarrel arose between him and Walter Raiford, in which profane and abusive language was uttered by both parties. During the quarrel the defendant, (Robert Raiford) handed a knife to Walter and said "cut him, or stick him;" and in the scuffle which ensued Walter Raiford attempted to do so. But, as to this matter, as well as to what the defendant said, there was conflict of testimony.

The parties were expelled from the house, but the quarrel did not cease. Granville Stocks, after angry and abusive

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epithets, went around the house, then returning, approached Walter Raiford, who knocked him down with an axe. Some of the witnesses testified that Granville Stocks was advancing, with an open knife, upon Walter Raiford when he was knocked down. On this point the evidence was conflicting.

After the court had charged the jury, the defendant asked the following charge, in writing :

"That unless the jury find, from the evidence, that the defendant had some previous concert or community of design before the commission of the alleged assault with Walter Raiford, to commit the assault on the person alleged to have been assaulted, or that the defendant actually participated in the alleged assault, or that the defendant aided and abetted in said assault, they must acquit the defendant."

CLEMENTS & ENOCHS for the appellant.—The court erred in its refusal to give the charge requested by the defendant. Code of 1876, § 4802; *Weeks v. The State*, 44 Ark. 398; *Harrington v. The State*, 35 Ala. 236; *Davidson v. The State*, 33 Ala. 350-352; Wharton's Am. Cr. Law, § 134; 3 Greenl. Ev. §§ 40, 41; 1 Bish. Crim. Law, §§ 439-440.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—Our statute has abolished the distinction between the principals in the first and second degree, and between either of these and accessories before the fact, so far as that distinction prevailed at common law in cases of felony. Code of 1876, § 4802. "And all persons concerned in the commission of a felony, whether they directly commit the act constituting the offence, or aid or abet in its commission, though not present, must (as in the case of misdemeanor) be indicted, tried and punished as principals."—*Scott v. The State*, 30 Ala. 503. In Wharton's American Criminal Law, section 118, it is said "any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in the second degree." Section 124: "There must be presence, either actual or constructive, at the time of the commission of the offence. It is not necessary that the party should be actually present, an ear or an eye witness to the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise."—4 Blackst. Com. 34. In 1 Bishop on Criminal Law, section

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604, it is said, "Next we have the offence of him who stands by, encouraging the act of crime, while the hand of another performs it. Such an offender is principal of the second degree."

The words aid and abet, in legal phrase, are pretty much the synonyms of each other. See Bouvier's Law Dictionary, and see the word abet in Webster's Dictionary. They comprehend all assistance rendered by acts, words of encouragement or support, or presence, actual or constructive, to render assistance, should it become necessary. No particular acts are necessary. If encouragement be given to commit the felony, or if, giving due weight to all the testimony, the jury are convinced beyond a reasonable doubt that the defendant was present with a view to render aid, should it become necessary, then that ingredient of the offence is made out. And if, the foregoing fact being found, Walter Raiford committed the alleged assault under circumstances to render his act an assault with intent to commit murder under the statute, then the jury would have been justified in finding the defendant guilty. Of course, the presiding judge, in charging the jury, should not adopt the general language employed above, but should define the statutory felony of assault with intent to commit murder.

Under the testimony in this record, if the defendant is guilty, the degree of his guilt is what was known at the common law as a principal in the second degree. The charge asked fairly specified the ingredients of that grade of offence, with some of the elements of an accessory before the fact. We think this charge should have been given.

Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

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Proceeding against Defaulting Tax-Collector.

1. *The notice to a defaulting tax-collector is both process and pleading.* In summary proceedings against defaulting tax-collectors, it is the settled practice to regard the notice of the motion for judgment as serving the double purpose of process and pleading. But the technical precision and accuracy of a declaration at common law is not required.

2. *Its allegations should be reasonably certain.*—It is sufficient when the liability of the defendant, which is sought to be enforced, is stated with

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reasonable certainty, and the defendant is fairly apprised of the cause of action, and the court informed of the judgment it is called on to render.

3. *The court judicially knows who are the sheriffs of the different counties.*—It is not necessary that the returns on the notices should state the county of which the officer executing them was sheriff. The courts are bound to know who are the sheriffs of the different counties. But a return that bears no date is defective.

4. *Ten days notice of the intended motion must be shown by the return.* Ten days notice to the party against whom judgment is to be rendered is an essential element of the proceeding. When the fact does not appear from the return, the court is without jurisdiction. This deficiency can not be supplied by parol evidence.

5. *The certificate of the Auditor is presumptive evidence of the act or omission upon which motion is based.*—The certificate of the Auditor is presumptive evidence of the act or omission upon which the motion is founded, and of the amount due the State. It is not required by law to be based alone on the returns on file in his office; when necessary, and he must judge of the necessity, he may resort to other sources of information, and predicate the certificate on facts derived from them.

6. *Its admissibility can not be questioned on account of the information on which Auditor acted.*—The admissibility of the certificate can not be questioned, nor its force as evidence lessened, because of the sources of information on which the Auditor may have acted. It conforms to the statute if it states the omission of the tax-collector to pay the amount of taxes collected by him into the State treasury, and the amount due the State.

7. *It is the duty of the judge of probate to make an abstract of the assessment.*—It is the duty of the judge of probate of each county, within five days after the adjournment of the board of equalization to make and certify to the Auditor a complete abstract of the assessment of all real and personal property in his county, showing the total amount and value of each class contained therein. If he discovers, after discharging the duty, that there are errors in the addition, he may lawfully correct them, and transmit a supplemental abstract to the Auditor. The abstract, when filed in the office of the Auditor, becomes a paper pertaining to the office, and is made evidence by the statute.

8. *An expert may show that the addition is correctly made.*—An expert, whether employed or not, who has examined the assessment book, and added up the entries in the different columns, may, with the book before the jury, point out the errors in addition previously made; the additions, as correctly made, and the true aggregate amount of the value of the taxable property of the county as shown by the book.

9. *The assessment book is the warrant of the tax-collector for the collection of taxes.*—The assessment book, when delivered to the collector, is an authority and warrant for the collection from each individual tax-payer of the tax assessed on property to him, whether the aggregate as shown by the certificate of the judge of probate is lessened or increased.

10. *The tax collector is, prima facie, chargeable with the taxes assessed.* On the delivery of the assessment book to the collector, *prima facie* he became chargeable with the tax assessed to each tax-payer; and when the time allowed for collecting has expired, must be deemed to have collected it, unless he discharges himself by showing that in the mode prescribed he has obtained credit for it, as an error of assessment, or because of the tax-payer.

11. *The burden of proving the charge, when denied, rests on the plaintiff.* It is error to refuse a charge which substantially asserts that the burden of proving the cause of action devolves on the plaintiff, when it is denied, and satisfactory evidence of it must be produced or he can not recover.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JAMES Q. SMITH.

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On the 20th day of December, 1875, Robert T. Smith, Auditor of the State of Alabama, issued the following notice, viz :

"The State of Alabama, Auditor's office, Montgomery, December 20, 1875. To James C. S. Timberlake, tax-collector of Dallas county, in said State, for the year 1870, and Charles F. Seivers, Albert H. Ross, Daniel P. Gunnells, James F. Timberlake and L. G. Weaver, his securities : *Whereas*, the said James C. S. Timberlake, tax-collector of Dallas county and State aforesaid, having failed to pay into the treasury of the State, within the time prescribed by law, the sum of twenty-five thousand five hundred and fifty-two 99-100 dollars, it being the amount of taxes collected by him while tax-collector aforesaid ;

"*And whereas*, the said Charles F. Seivers, Albert H. Ross, Daniel P. Gunnells, James F. Timberlake and L. G. Weaver are the securities of the said James C. S. Timberlake, on his official bond as tax-collector of said county of Dallas, and for the year aforesaid, which said bond, for the sum of forty thousand dollars, bears date on the 22d day of April, 1870, and is payable, conditioned and approved as required by law.

"You are therefore hereby notified at the next term of the Circuit Court for Montgomery, to be holden on the first Monday in June, A. D. 1876, I shall, by the Attorney-General, move for a judgment against you in favor of the Auditor, for the use of said State, for the sum of twenty-five thousand five hundred and fifty-two 99-100 dollars, together with interest and damages thereon.

"R. T. SMITH, Auditor."

This notice was executed on James C. S. Timberlake, on December 20, 1875. A similar one, differing only in the names contained in it, was served on the said Seivers, on the same day.

At the next term of the Circuit Court of Montgomery county thereafter a motion for judgment was entered by the Attorney-General, in accordance with the terms of the foregoing notice. It was continued under the general order of the court "continuing all causes not otherwise disposed of."

At the December term, 1876, of said Circuit Court, on motion of the Attorney-General, Willis Brewer, the successor of Robert T. Smith as Auditor of the State, was "substituted as party plaintiff, and motion continued for service to be perfected" on the other sureties.

On May 17, 1877, Willis Brewer, the Auditor of the State,
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issued to each of these sureties of James C. S. Timberlake, viz: L. G. Weaver, James F. Timberlake, Daniel P. Gunnells and Albert H. Ross, a notice similar to the one already set out, but differing from it in a part of the names contained. The notice directed to James F. Timberlake was never served, Weaver was served with process on the 18th day of May, 1877, and the notices addressed to Gunnells and Ross were returned with this endorsement:

"Executed by serving copies on Albert H. Ross and Daniel P. Gunnells.

"A. C. STEWART, Sheriff.

"J. W. JOURNEY, Deputy Sheriff."

On the trial of the motion at the June term, 1877, the plaintiff entered a discontinuance as to James S. Timberlake, "not served," and, by the Attorney-General, moved the court to enter a judgment against the other defendants.

Thereupon, Daniel P. Gunnells, Albert H. Ross, and L. G. Weaver each moved the court to be allowed to appear, by counsel, for a specified purpose. The motion was granted.

Each of the three defendants last named moved to quash the notice issued against him by Willis Brewer, Auditor, on the 17th day of May, on the grounds: *First*, that the said notice was not issued in the cause then on trial; "that said notices purported to be, and were in fact, original notices of an original motion to be made as therein stated; that said three notices, if regarded as process in the cause then on trial, were insufficient because the names of the several persons against whom the process issued, and against whom the motion was to be made, were not therein stated; and because the names of the sureties on the bond of J. C. S. Timberlake, as tax-collector of Dallas county, are not therein stated; and because said notices, and each of them is insufficient and defective." The motion to quash was overruled, and the defendant excepted.

Thereupon, the said Albert H. Ross and Daniel P. Gunnells moved the court to quash the return of the sheriff, endorsed on the notices against them, "on the ground that it does not appear from said return that said notices were received by any sheriff of the State of Alabama; nor that Stewart, who made the return, is the sheriff of any particular county in the State; nor whether the service was before or after the issuance of the paper; nor when it was nor where it was made; and that said return is wholly insufficient to show service of said notice on said defendants, or either of them, or that they are the persons named in said return."

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During the consideration of this motion, "it was proved by the Attorney-General that these notices, with the sheriff's return thereon, had been in his possession for more than ten days before the trial of the said cause, and were in his possession before the commencement of this term of the court." The court overruled the motion, and the said defendants excepted.

Thereupon, the said Daniel P. Gunnells, Albert H. Ross, and L. G. Weaver declined to appear further or for any purpose than as above stated.

The said Charles F. Seivers, Albert H. Ross, Daniel P. Gunnells, and L. G. Weaver declined to appear, but made default.

The said James C. S. Timberlake pleaded the general issue, and demanded a trial by jury. A jury was duly impanelled. "The plaintiff, by the Attorney-General, read in evidence the said five notices before mentioned; and a copy of the official bond of the said tax-collector; and also the following certificate, made by the Auditor of the State and subscribed to the account which the State of Alabama had against James C. S. Timberlake, tax-collector of Dallas county:

"I, W. Brewer, Auditor of the State of Alabama, do hereby certify that James C. S. Timberlake, tax-collector of Dallas county, State of Alabama, for the year 1870, has not paid into the State treasury the taxes collected by him as tax-collector aforesaid; that the above account is a true and correct statement of the amount due the State of Alabama by the said James C. S. Timberlake, as tax-collector as aforesaid; and that the amount due said State by the said James C. S. Timberlake, as said tax-collector, is twenty-five thousand, five hundred and fifty-two 99-100 dollars.

"WILLIS BREWER, Auditor."

To the introduction of this certificate the defendant objected; but the court overruled his objection, and the defendant excepted. The certificate was read to the jury and the plaintiff rested his case.

The defendant then offered in evidence the book of assessments of Dallas county for the year 1870; the certificate of the judge of probate appended to the said book of assessments; a certificate of the said judge of probate sent to the Auditor of the amount of taxes due on the said assessment; and also read in evidence a "transcript from the proceedings of the Court of County Commissioners of Dallas county relative to the assessment and collection of taxes of that county."

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But as no objection was made to any of the evidence, it is unnecessary to set it out in detail.

In rebuttal, the plaintiff "introduced one Haralson as a witness, who testified that in the fall of 1871 he was employed by the Commissioners Court of Dallas county to add up the said book of assessments offered in evidence as aforesaid. Pursuant to the appointment, he added up the assessments and made a report of the result of his addition to the Court of County Commissioners in the fall of 1871; but the said addition was made hurriedly, and he stated to the commissioners that it was probably incorrect." He was requested to revise the addition, and "found that it was largely incorrect." The second addition was made by him with great care, "by adding the columns from right to left and from top to bottom." By this process he ascertained the aggregate amount of the value of taxable property and items of taxation of Dallas county. He prepared a certificate, showing the amount of taxes due to be largely in excess of the statement already signed by the judge of probate, and sent to the Auditor. The judge of probate signed the certificate so prepared and transmitted it also to the Auditor of the State. To all the foregoing testimony the defendant objected; but his objection was overruled, and the defendant excepted.

On the cross-examination of the witness, evidence of the details of the examination of the book of assessments was elicited, but as no objection to such proof was made, a particular statement of it is unnecessary. But at the conclusion of his examination, the defendant moved the court to exclude from the jury the certificate of the Auditor, subscribed to the said account of the State against the defendant, Timberlake, "on the ground that it appeared that the certificate of the Auditor was based on the said certificate" of the judge of probate, "prepared by the said Haralson as aforesaid." The court refused the motion, and the defendant excepted.

The court charged the jury that "the plaintiff was entitled to recover in this proceeding the amount of all the taxes lawfully assessed in Dallas county for the year 1870 for the State, and which were shown by the evidence to have been collected by the defendant, as tax-collector of said county, and not paid into the State treasury; and in ascertaining the said amount, the jury might consider the certificate of the Auditor, read in evidence: both certificates of L. F. Conolly (the judge of probate), read in evidence; and the book of assessments of said county for said year, and the testimony of the witness Haralson, in connection with all the other evi-

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dence." To this charge the defendant (Timberlake) excepted.

The defendant, among other charges, in writing, then asked the following:

"8. The court charges the jury that the State brings their suit in this action for the breach of contract, and that it is incumbent upon the plaintiff to establish, by evidence satisfactory to the jury, first, that the contract has been broken, and, secondly, the amount of damage that has been sustained by such breach."

"9. That the plaintiff in this action can not recover in respect of any taxes except such as were certified by the board of equalization to have been duly assessed."

The court refused to give the charges, and to each refusal the defendant separately excepted.

The jury retired and returned the following verdict in favor of the plaintiff: "We, the jury, find in favor of the plaintiff, and assess the damages at \$40,000." The defendants, Ross, Gunnells and Weaver, then moved the court for an arrest of judgment against them on the grounds: *First*, that no issue as to the liability of these defendants was submitted to said jury; *second*, the said defendants did not appear and plead to the said notice or motion in said cause, and the said cause as to the said defendants was not submitted to said jury; *third*, that the notices in the said cause are insufficient in law to authorize any judgment against said defendants or any of them.

The court overruled the motion, and the defendants, Ross, Gunnells, and Weaver, excepted.

D. S. TROY, for the appellants.—1. The notice issued to each of the sureties did not set forth the names of the other sureties on the bond upon which the motion was based, and for that reason did not sufficiently describe the bond on which the motion was made.—*Griffin v. The Bank*, 6 Ala. 908; *Johnson v. Plant. & Mer. Bank*, 17 Ala. 754; authorities collected in 2 Brick. Dig.

2. When a judgment is sought against six joint makers of a bond, on what principle can it be contended that a complaint as to one shall describe the bond as made by the principal and one defendant surety named "et al.?" Such a declaration at common law against two of the defendants, makers of a bond, "et al." would not authorize a judgment against five defendants.—1 Chitty Plead. 256, *et seq.* The defendants, Gunnells, Ross, and Weaver, could not demur or

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plead, because no motion was made pursuant to the notice. In this case the motion was in fact submitted to the court and acted on at the June term, 1876, and at December term, 1876. The motion was entered in June term, 1876, against Timberlake and Seivers on notices served on them on December 20, 1875. If this had not been done the motion would have been discontinued as to them. The notices to Gunnells, Ross and Weaver were in fact *alias* notices, but there was nothing in them to indicate this fact.

The judgment against Ross, Gunnells and Weaver was rendered on the 18th of June, 1877, when the notice said that a motion would be made "at the next term of the Circuit Court for Montgomery, to be holden on the first Monday in June, 1877." It has been held that when notice stated motion would be made on the 29th, and it was made on the 30th, the judgment would be reversed.—*Barclay v. Barclay*, 32 Ala. 345. When the court sits only one week, it may not be necessary to name the day on which the motion will be made, but when, as in this case, the court sits more than one week, a notice which did not specify the day on which the motion would be made, would be clearly insufficient.—Code, § 3015.

The return of service on the notices to Ross and Gunnells was insufficient. The notices were not directed to any sheriff—and there is nothing which shows they were received by a sheriff—nor when and where they were executed, or of what county A. C. Stewart was sheriff. Moreover, there was no *date* to the return. This is a defect no presumption will supply.—1 Ark. 50; 2 Scam. (Ill.) 175, 176; 1 Nott & Mc. 171-3; 3 How. 70; 1 South (N. J.), 108. The court therefore erred in its refusal to quash the return.

The court erred in overruling the objections to the admission of the Auditor's certificate; to the admission of Haralson's evidence; and to the admission of the certificate of judge of probate, based on the report made by the said Haralson. The witness, Haralson, was no officer known to the law; nor is there any law which authorizes the probate judge to make a certificate to the Auditor based upon the combined judicial and ministerial action of Haralson. The certificate of that officer, showing the amount of the assessment as ascertained by the board of equalization, had been given to the Auditor nearly two years before it was authorized by law.

And when the statute, Revised Code, 3061, declares that the certificate of the Auditor shall be presumptive evidence

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of the amount due the State, it means a certificate based on the official returns made to him.

There was no principle of law which authorized the admission of Haralson's evidence as to the results of his addition of the book of assessments, or of admitting the certificate of the judge of probate which was prepared by Haralson. The book of assessments had been introduced by the defendant with the certificate of judge of probate after the action of the board of equalization.—Acts of 1868, pp. 328–9, §§ 101, 102.

The charge of the court was erroneous, because it authorized the jury to consider the certificate of the judge of probate; the testimony of Haralson, and the certificate of the Auditor in ascertaining the amount of taxes collected by Timberlake and not paid into the treasury. It assumed the plaintiff was entitled to recover without submitting to the jury the credibility of the evidence, and by assuming that the evidence showed the same amount of taxes had been collected and not paid into the treasury.

The charge, number 8, can not be controverted; it is not abstract; it is not calculated to mislead the jury; on the contrary, it directs them pointedly to the issues involved. The other charges present substantially the objections made to the admission of the testimony of Haralson; the certificate of the judge of probate, and the Auditor's certificate.

The plaintiff went to trial on the issue tendered by Timberlake, without taking a judgment by default against the defendants, who refused to appear and plead. This was erroneous.—Tidd's Practice, 894–5.

JOHN W. A. SANFORD, Attorney-General, and DAVID CLOPTON, for the appellee.

BRICKELL, C. J.—This is a summary proceeding, under sections 3059–61 of the Revised Code, against a tax-collector, and the sureties on his official bond, for a failure to pay into the State treasury the amount of State tax collected by the collector in 1870. In proceedings of this character, it is the settled practice to regard the notice of the motion for judgment as serving the double purpose of process and pleading. While as pleading it will be insufficient, unless it shows distinctly every fact on which the plaintiff's right of action, and the liability of the defendant depends, the technical precision and accuracy of a declaration at common law, or of the corresponding pleading, a complaint under the Code is not required. It is enough, when the liability of the defend-

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ant which is sought to be enforced is stated with reasonable certainty—when the defendant is fairly apprised of the cause of action, and the court informed of the judgment it is called on to render. The rules of the common law in reference to variance, have but a limited application in such a proceeding.—*Lyon v. State Bank*, 1 Stew. 442; *Colgin v. State Bank*, 11 Ala. 222. The notices issued to Weaver, Gunnells, and Ross, vary from the original notice, in no other respect than that they are directed to each one of them, and not to all the makers of the bond, and do not aver who are the other co-makers. The date and amount of the bond—the default of the principal for which a recovery is claimed, are averred as in the original notice. These notices, when served, must be filed with, and become parts of the proceedings in the suit commenced by the original notice. It is not possible to doubt that each defendant was reasonably informed of the precise cause of action, upon which the motion for judgment would be made, and the court could not hesitate as to the judgment which should be rendered, if the facts stated in the notices were proved. This is all the statute contemplates.

2. The statute does not in express terms require that the notice shall be in writing, nor is the mode of giving it prescribed. Ten days notice of the motion is its only requisition. The notice serves the purpose of its process—it is its service, for the period of ten days before the motion is made, which gives the court jurisdiction of the person of the defendant, and authority to proceed to hear the motion.

The returns on the notices are not insufficient because they do not state the county of which the officer executing them was sheriff. The courts are bound to know who are the sheriffs of the different counties; and if they were not, the mere statement by a person returning process that he was sheriff of a particular county, would not be evidence of the fact.—*Snelgrove v. Br. Bank Mobile*, 5 Ala. 295. But the returns on the notices to Gunnells and Ross were insufficient, because without date. Ten days notice to the party against whom judgment is to be rendered, is an essential element of the proceeding. The fact does not appear from the return, and the court was without jurisdiction to proceed to judgment against them. Nor could this deficiency be supplied by parol evidence. The return is the act of the officer, and must be in writing, and complete in itself. It can not rest partly in parol, and partly in writing. When deficient, it

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may be amended, but the amendment must be made by the officer under the direction of the court.

3. The certificate of the Auditor is by statute made presumptive evidence of the act or omission upon which the motion is founded, and of the amount due the State.—Rev. Code, § 3061. The Auditor is charged with the superintendence of the fiscal affairs of the State, and with the duty of auditing and adjusting the accounts of all public officers, keeping a regular account with every person in each county in the State, who is by law authorized to collect and receive any part of the public revenue. It is contemplated by the statute, that he will diligently inquire as to the amounts of the public revenue derived from taxation, which may be received by each probate judge,⁸ and each tax-collector. If the officers on whom the duty is cast, make proper returns and certificates to his office, documentary evidence will generally be found in the office, on which he may make the certificate which becomes presumptive evidence. The duty may be neglected by these officers, or may be performed negligently, or so imperfectly, with such little regard to accuracy, as not to furnish him the requisite information. There is no indication in the statutes of any purpose to confine him to these sources of information, reducing his certificate to a mere statement of the facts which they disclose. Though he may accept them as sufficient, and usually they may be,—when necessary, and he must judge of the necessity, he may resort to other sources of information, and predicate the certificate on the facts derived from them. The duty he is required to perform, is diligent inquiry as to the amount of the public revenue derived from taxation, received by the judge of probate, or the tax-collector, and a certificate of the amount either has failed to pay into the State treasury. The certificate becomes presumptive, not because of the sources of information on which the Auditor may predicate it, but because it is made in obedience to law, in the performance of official duty, and under the sanction of official oath.

Nor can an inquiry be indulged, and a controversy entertained as to the admissibility of the certificate, or its force as evidence lessened, because of the sources of information on which the Auditor may have acted in making it. The point of controversy, and of inquiry, is, are the facts stated in it true—has the officer committed the default to which the Auditor certifies. Such default may have been committed, though the evidence on which the Auditor proceeds was mere hearsay, or his sources of information may not be such.

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as the law would regard as the best and highest. The objections made to the certificate of the Auditor in the Circuit Court were properly overruled. It conforms to the statute—it states the omission of the tax-collector to pay the taxes collected by him into the State treasury, and the amount due the State. Of these facts it was admissible and presumptive evidence, compelling the defendants to repel the presumption by evidence, not merely in disparagement of the information on which the Auditor acted in making it, but of its untruth.

4. Nor was there any ground of objection to the abstract of assessment certified to the Auditor by the judge of probate. The revenue law of 1868 established in each county a board of equalization, charged with the duty of examining the assessment book which the assessor was required to return to the probate judge. It was also the duty of the board to hear complaints from the tax-payers as to erroneous or excessive valuations of taxable property, and to equalize the valuations, so that they would be uniform throughout the county. Of this board, the judge of probate was *ex officio* chairman, and it was his duty when the board had concluded the examination and equalization, to certify its action on the book of assessment, with a statement of the aggregate value of the taxable property of the county as determined by the board. It was also his duty, within five days after the adjournment of the board, to make and certify to the Auditor, a complete abstract of the assessment of all real and personal property in his county, showing the total amount and value of each class of taxable property contained therein. The book of assessments having been examined by the board of equalization, the judge of probate appended a certificate of the action of the board, and which, also, stated the aggregate value of the taxable property of the county. The certified abstract of the assessment was also forwarded to the Auditor; and the collector had paid into the State treasury the amount of the State tax as shown by it. These facts having been shown in defence, the Auditor was permitted to show errors in the book of assessment—not in the valuations of property, nor in the omission of persons or property subject to taxation—but errors in the additions of the valuations contained in the book, which, when corrected, increased the aggregate value of the taxable property of the county as shown in the book. It was not proposed to add to or subtract from the entries in the book—mere arithmetical errors in the additions of the several columns stating the class and value of the taxable property assessed to each tax-payer were to be cor-

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rected. These corrections having been made, the judge of probate certified a second abstract of the assessment to the Auditor, showing the value of the taxable property as contained in the assessment, and it is to the admission of this abstract as evidence objection was made. The point of objection is, that there was no authority to re-examine the book of assessment and correct these errors, after the book had been examined by the board of equalization, and the certificate of the judge of probate had been appended, showing the aggregate value of the taxable property of the county—and that the judge of probate had no authority, having once made a certified abstract of the assessment to the Auditor, to make a second correcting the errors of the first. The duty of adding the valuations of each species of taxable property in the county, and thus disclosing in an aggregate sum the total amount of the assessment, was not devolved on the board of equalization. Their duty was confined to the correction of erroneous or excessive valuations, thereby producing an uniform and equal valuation throughout the county. This duty was in its nature *quasi* judicial, and when it was once performed, however erroneously, it could not be corrected after the adjournment of the board, unless it was by some direct proceeding in a proper tribunal, if there was any, having jurisdiction. The duty of adding together the different valuations of the taxable property, showing the aggregate of the assessment, was merely clerical, imposed in the first instance on the assessor.—Pamph. Acts 1868, 311, § 37. After the board of equalization had acted, their action, if it varied the valuations of the assessor, would necessarily vary the aggregate of the assessment. Then, it was the duty of the judge of probate to certify on the book of assessment the aggregate value of the taxable property of the county. The form of certificate embodied in the statute, states that the board have *determined the aggregate value*; but the determination was not by performing the mere clerical duty of adding the valuations; it was by the changes of the assessor's valuations the board may have ordered. The duty of certifying the aggregate value of the taxable property devolved alone on the probate judge, and included the duty of ascertaining it. All error in ascertaining and certifying it is merely clerical. The error can work injury to no one—the valuations found on the book are not changed—no new burthen is imposed on the tax-payer, and no right affected. The power and duty of the officer to correct such an error can not be doubted—the means of correction are found in the book—there is no

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necessity for a resort to extrinsic evidence, and the aggregate value of the taxable property, is simply made to correspond to the particular and several valuations found in the book.

The duty of the judge of probate in the preparation and certificate of the abstract of assessment, which he was required to forward the Auditor, was also merely clerical. The abstract was intended simply to furnish evidence, which should remain on file in, and become a document of, the Auditor's office, by which the total amount and value of each class of taxable property of the county as shown by the book of assessment, could be ascertained. It was subject to correction at all times by reference to and comparison with the book of assessment, which in the absence of statutory provision, would be the highest and best, and so long as it could be produced, the only evidence of these facts. That an erroneous abstract can not be corrected by the probate judge—that he and the State are inexorably bound by it—that it is irreparable and irremediable, is a proposition which can not be admitted. The duty of the judge is not performed—his power is not exhausted—until he has certified to the Auditor *a complete abstract of the assessment of all real and personal property in his county, showing the total amount and value of each class of taxable property contained therein, extended into a column, and the total amount of such sums, so extended.* An incomplete abstract—imperfect, erroneous, misleading, because the valuations are not properly extended, or not properly added, is not the abstract it is his duty to furnish, and does not lessen his duty or power to furnish one complete. If several are certified, and a controversy arises as to which is correct, it can be determined by the book of assessment—not by the mere additions and items of aggregate amounts which may be found therein—but by the several entries of taxable property, and its valuation, as assessed to each taxpayer. The abstract when filed in the office of the Auditor, becomes a paper pertaining to the office and is made evidence by the statute.—Code of 1876, §§ 3047-49.

5. It is not material in what capacity Haralson acted in making the examination of the book of assessment. The capacity was not official—the duty performed was not strictly ministerial, nor was it judicial, as these terms are applied to official duty; it was simply clerical—that of an accountant. It may have been performed voluntarily without request from, and without the cognizance of the judge of probate, or of the Commissioners Court. Though it was performed at the request of the Commissioners Court, the results of the exam-

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ination do not thereby become legal evidence. But it was not the result of the examination which was proved or offered in evidence. Having examined the assessment book, added up the entries in its different columns, with the book before the jury, he pointed out the errors in addition previously made—the additions as correctly made, and the true aggregate amount of the value of the taxable property of the county, as shown by the book. He was not required to give any construction to the written entries, nor to declare their legal effect. On the well-settled rule, and the reason of it, that when the characters in which a paper is written are obscure or difficult to be deciphered, the evidence of persons, whom practice and experience have made skilful, will be received to aid the court or jury in arriving at a true reading of the instrument, the evidence was admissible.—*Stone v. Hubbard*, 7 Cush. 595; *Sheldon v. Benham*, 4 Hill, 597; 2 Whart. Law of Ev. § 972.

6. The assessment book when delivered to the collector, is the authority and warrant on which he proceeds in the collection of taxes. Not an authority and warrant for the collection of the amount of the taxes as shown by the aggregate value of the taxable property as certified by the judge of probate. It is an authority and warrant for the collection, from each individual tax-payer, of the tax assessed on property to him—whether the aggregate as shown by the certificate of the judge is lessened or increased. The revenue law of 1868 pointed out a particular mode, by which he could obtain credit because of errors in the assessment book, or because of the insolvency of the tax-payer. *Prima facie* on the delivery to him of the assessment book, he became chargeable with the tax assessed to each tax-payer; and when the time allowed for collecting has expired, must be deemed to have collected it, unless he discharges himself by showing that in the mode prescribed he has obtained credit for it as an error of assessment, or because of the insolvency of the tax-payer. At his instance, in answer to the demand of the State, regularity, or legality of assessment, is not an inquiry. The substantial inquiry is, has he, by virtue of his office, received money for the State. If he has, it is not his province to dispute the right of the State to receive it, unless he can show that the tax-payer has demanded, and he has refunded it.—*Thompson v. Stickney*, 6 Ala. 579; *Boring v. Williams*, 17 Ala. 510; *Cooley on Taxation*, 500. The errors in the additions on the assessment book, and in the first certified abstract to the Auditor, were not material. The inquiry was, what

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was the amount of the State tax the collector had received. This amount was ascertainable not by the mere aggregate of the valuations on the tax-book—or by the certified abstract to the Auditor—but if these varied from the separate items assessed to each tax-payer, by a true aggregation of these items. These items he had authority to collect, and it is not for him having collected them, to discharge himself by paying into the treasury, not these items, but the aggregate amount of the assessment as shown by the erroneous additions of some other officer, which these greatly exceed. Profiting by such errors, the law does not tolerate.

The rulings of the Circuit Court in the admission, and in the refusal to exclude evidence, was in conformity to these views, as was the instruction given the jury to which an exception was reserved. There was no error in the refusal of the instructions requested by the appellant, except that numbered eight. The burden of proving the cause of action devolves on the plaintiff, when it is denied, and satisfactory evidence must be produced, or he can not recover. This is the substance of the charge, and we can discover no reason for refusing it. The remaining question, relating to the mode of taking and entering judgment, will not probably arise again, and its determination is unnecessary.

For the errors pointed out the judgment must be reversed and the cause remanded.

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Ejectment.

1. *A deed must be attested by at least one subscribing witness or acknowledged.*—An instrument intended to convey lands is inoperative to transfer the legal title, unless, if the grantor can write, it is attested by at least one subscribing witness, or execution of it is acknowledged by the grantor in the manner prescribed by law.

2. *Unless the plaintiff shows such a deed, or that it once existed, he can not recover.*—On a trial of an action of ejectment a plaintiff who does not exhibit such a title to the land in controversy, or prove that such a deed once existed, is not entitled to recover.

3. *It is error to give a charge not sustained by the evidence.*—Charges given by the court, at the request of the plaintiff, and founded on recitals of facts of which no evidence whatever was submitted to the jury, are erroneous, and will cause a reversal of the judgment.

APPEAL from the Circuit Court of Montgomery.

[Bank of Kentucky v. Jones et al.]

Tried before the Hon. JAMES Q. SMITH.

The facts are contained in the opinion.

SAYRE & GRAVES, for Appellant.—1. Section 1535 Revised Code fixes the mode and manner of executing deeds of conveyance. It is imperative. This is shown by the use of the word “must.” That part which signifies the instrument to be written or printed, or that part of it which requires the the name of the contracting party to be signed at the foot, &c., could just as well be disregarded as the portion in reference to attestation. An instrument not attested as provided for in said section will not operate to alienate lands in this State.—1 Ohio, 164; 3 Conn. 35; 3 N. H. 254; 6 Wheat. 577. If this proposition be true, the court should have charged the instrument as to which the witness testified was void.

2. The contents of no instrument was ever proven on such flimsy evidence. The witness does not testify to a single word in the writing except the signature; the balance is his conclusions—such being the evidence, it was the duty of the court to charge upon the legal effect as requested.—33 Ala. 654; 2 Mason, 465; 1 Pet. 600; 16 Ala. 130.

3. The charges asked by plaintiff ought to have been refused, there being no evidence on which to predicate it. As to the construction of registration laws, see 8 Ala. 866; 24 Ala. 37; 22 Ala. 743.

4. Sections 2599 and 1535 of the Revised Code must be construed together; and to ascertain the meaning of the word “signed” we must refer to section 1535. A deed is not signed unless it complies with the provisions of this section.

WATTS & SONS, for appellees.—1. Unless the deed is withheld for some sinister purpose, slight evidence of its existence and loss will authorize its contents to be proven.—1 Brick. Dig. p. 848, § 632; 18 Ala. 359; 9 Port. 39; 3 Ala. 449. The contents of the deed proven by the witness were not too vague and uncertain, when taken in connection with other facts and circumstances, to supply the place of the written instrument.—3 Ala. 449; 8 Ala. 59.

2. Though there was no direct evidence of the fact, circumstances may be admitted to prove, and for the jury to infer, a proper execution of the deed.—15 Ala. 112; 16 Ala. 725; 14 Ala. 803. Proof of handwriting of Bozeman was sufficient.—17 Ala. 714; 15 Ala. 818.

3. The charges given by the court at request of plaintiff

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were correct, unless it be clearly shown no such testimony was before the court.—1 Brick. Dig. p. 337, § 2330. They must be construed in reference to the facts in evidence. Nowhere does the bill of exceptions declare it sets forth all the testimony.

MANNING, J.—The suit in this cause was for land. The bill of exceptions in it shows that it sets forth “substantially all the evidence in the case.”

The action was brought by appellees, as heirs of one Alfred Jones, deceased; and the land belonged originally to one Johnston, and was sold by him in December, 1859, to one Bozeman, who went into possession of it. “There was evidence that one Dillahay, in the early part of the year 1860, was in possession of said land, and cultivated it,” also, that prior to that a negro, belonging to Alfred Jones, had hauled some old logs on the land, with which Jones built a small house, and that he was in possession of the land early in 1860. He died in March, 1860; and administration of his estate was granted to Dillahay and one Calloway. “There was evidence that Dillahay continued the cultivation of the place during the remainder of the year, . . . and that Dillahay and Calloway, as the administrators of Jones, after his death, cultivated the place for the remainder of the year; there was evidence that the aforementioned Bozeman had possession of the land in 1861 and 1862, and until he sold and conveyed the land, in 1863, to one Corbin, who took possession; and that he and those claiming under him have continued in possession.” Appellant claimed under title and possession derived from him.

The suit was brought by appellees August 21, 1875, and to show title in them, the testimony of a witness was introduced, who said that at the administrator’s sale of Jones’ estate “he thought he bought the land;” and Calloway testified that the land was in possession of Jones at his death, and after his death was taken possession of by his administrators; and that they continued in possession “until sometime in 1861, when the said administrators offered for sale at public outcry what was supposed to be said land, and the land thus offered for sale was bid off by T. R. Carter.” But no deed or instrument of any kind was offered, of such sale, or authority shown to sell it, or evidence given that the supposed purchaser ever took possession.

Calloway further testified that “he found among Jones’ papers a writing signed by Bozeman, but did not know

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whether it was signed by Bozeman's wife or any one else ; . . . could not state whether the deed was attested or acknowledged ; . . . testified that the writing was a conveyance from Bozeman to Jones of the land in controversy ; that he knew Bozeman's handwriting and had seen him write three times ; . . . that the writing was in his possession as administrator until the spring of 1865, when it was destroyed by the Federal troops, with other papers ; that he could not remember the numbers of the land set out in said deed, or whether the land was described by numbers, but testified that the description included the lands sued for, and . . . he thought the deed was dated November, 1859," but "he knew nothing further of the contents of the writing." Witness was a farmer.

To maintain the action, plaintiffs had to show legal title in themselves. It has been decided by this court that an instrument intended to convey lands would not be operative to transfer the legal title, unless, if the grantor could write, it was attested by at least one subscribing witness thereto, or execution of it was acknowledged by the grantor in the manner prescribed by law, and before one of the officers authorized to certify to such acknowledgement.—*Hendon v. White*, 52 Ala. 599 (and other cases in manuscript).

In the present cause no deed is exhibited through which such title to the land in controversy could have come to the plaintiffs below, even if they were, which is not proved, heirs-at-law of Alfred Jones ; to whom, it is contended, the land was once conveyed. Nor is there evidence that such a deed ever existed. It does not appear, in fact, that they have a particle of right to the land, legal or equitable. And if a motion had been duly made to that effect, by defendants below, the jury ought to have been instructed to return a verdict for defendants.

The charges given to the jury, at the instance of plaintiffs, and excepted to on behalf of appellants, are founded on recitals of facts, of which no evidence whatever was submitted, according to the bill of exceptions. These charges were consequently erroneously given.

Let the judgment be reversed and the cause be remanded.

[Goodwyn et al. v. Baldwin et al.]

Goodwyn et al. v. Baldwin et al.*Statute of Limitations.*

1. *After the lapse of twenty years, a presumption of payment will arise.* If parties allow twenty years to elapse without taking any steps to compel the settlement of a mortgage debt, or to assert rights of property, the presumption of payment or settlement of the disputed title arises.

2. *If a purchaser has constructive notice of the mortgage, he is also informed by its date, of the presumption of the law.*—If the purchasers of land are constructively notified by the registration of a mortgage more than twenty years old, of the lien and incumbrance it created, they are also informed by its date and age that the law presumed the payment of the debt it was given to secure.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

The facts appear in the opinion.

MACDONALD & GRAHAM, and JOHN G. WINTER, for appellants.—1. No authorities go to the extent of saying that the administrator of a deceased mortgagor is not a proper party to a bill of foreclosure. If the mortgagee chooses to proceed for an account he may, and the better opinion would seem to be, he must make the personal representative a party. 5 Ala. 158. As to the statute of non-claim, the law expressly declares it must be taken advantage of by a special plea.—2 Ala. 382. But there seems to be such manifest error in the decree sustaining the administrator's demurrer that we do not think any further argument on this point is necessary.

2. The bar of the statute *never* runs in favor of the mortgagor in possession, or those claiming under him, without some open, explicit denial of the mortgagee's title brought to the knowledge of the mortgagee.—5 Ala. 424; 16 Ala. 581; 29 Ala. 714; *Coyle v. Wilkins*, 56 Ala. 108; 2 Washb. on Real Prop. 172.

3. Upon the marriage or majority of the ward the fiduciary relation ceases.—4 Watts & Serg. 551; and the guardian becomes a naked trustee.—17 Ala. 636; 21 Ala. 450.

4. The principal, if not only ground for this presumption of payment growing out of a lapse of time, is "that a man is always ready to enjoy his own. Whatever will repel this

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will take away the presumption of payment, and for this purpose it has been held sufficient that the party was a near relation or insolvent."—2 Saxton's (N. J.) Ch. Reps. 685; 12 Vesey, 265; and the case in 5 Conn. p. 1, is a convincing authority to show that insolvency destroys the reason of the rule; and all authorities concur that the presumption may be explained by circumstances showing satisfactorily why an earlier demand has not been made.—2 Strange Reps. 826; 16 Wend. 245. It was held in 10 Johns. 417, that twenty years are only a circumstance on which to found a presumption of payment, and is not of itself a legal bar.

5. The purchasers of the mortgagor had notice of this incumbrance. It was constructive notice, but for every purpose of protecting the mortgagee against the consequences of alienation it is equivalent to actual or direct notice. 9 Wheat. 498; 6 Abbott's Pract. Rep. (N. S.) p. 170.

6. To raise the presumption of payment the possession of the mortgagor and those claiming under him, must be adverse to the mortgagee. — *Coyle v. Wilkins*, *supra*; 9 Wheat. 289.

SAYRE & GRAVES, and CLOPTON, HERBERT & CHAMBERS, for appellee.—1. In this case the record of the mortgage gave notice of its existence; but it also gave notice that the mortgage was then more than twenty years old. It gave no notice of any "special circumstances" which would prevent the statutory bar. The defendants, therefore, occupy the position of innocent purchasers.—32 Ala. 88; 46 Ala. 536—176; 21 Ala. 215; 5 Ala. 97; 5 Paige, 502; 28 Ohio St. Reps.; *Ridgway v. Glover* (in manuscript); *Coyle v. Wilkins*, 56 Ala. 108. The head-note in *Fox v. Reeder*, 28 Ohio St. Rep., is directly in point.

STONE, J.—In *McArthur v. Carrie*, 32 Ala. 75, the question of lapse of time and long acquiescence was pretty fully considered. Many authorities were cited, and some of them commented on. The principle there asserted has been followed, and has become a rule of decision in this court.—See *Austin v. Jordan*, 35 Ala. 642; *Coyle v. Wilkins*, 56 Ala. 108. The substance of the principle is, that if parties allow twenty years to elapse without taking any steps to compel a settlement, or to assert rights of property, the presumption of payment, or settlement of the disputed title arises. We have no disposition to re-examine the grounds on which that principle rests.

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The bill in the present case was filed in July, 1877, to foreclose a mortgage on real estate executed by Frederic Raoul in May, 1844, to secure a debt due January 1, 1845. The bill avers a payment of interest was made in 1846; and that since that time, no payment has been made on the debt. The mortgaged premises have all the while been in the possession of the mortgagor, and those claiming under him. The bill further charges that all the lands embraced in the mortgage have been sold and conveyed away—partly by Raoul in his lifetime, and the residue by his devisees since his death; and that the purchasers are in possession. The bill does not charge that such purchasers owe any purchase money for the lands, and it does not charge the purchasers or any of them with actual notice of the existence of the debt or mortgage. It relies alone on the constructive notice given by the due proof and registration of the mortgage, made in June, 1844, and in the proper county.

To avoid the effect of so great lapse of time, the bill contains the following averments: "That said Frederic S. Raoul admitted up to his death [in 1870] the existence of said mortgage as a valid incumbrance on the lands therein conveyed, and at no time denied the existence of the same. That the said Frederic Raoul was, from the time of the execution of the said mortgage, and up to his death, in straitened financial circumstances—virtually insolvent—and that any attempt made by the beneficiary of said mortgage deed of trust to enforce said mortgage, would have resulted in the absolute ruin, or great financial distress of said Raoul, mortgagor, who was the brother of said beneficiary. . . . But that now, so it is, may it please your honor, your orators knowing that financial ruin has in fact overtaken the estate of said mortgagor, and that family affection and consideration are no longer excuses for not enforcing their said security, your orators ask your honorable court to enforce said security by a foreclosure of the said mortgage." The plain import of this averment is, that so long as the mortgaged premises served and could serve the comfort and maintenance of Raoul and his family, the mortgagees were unwilling to disturb them. But that now, when the family have ceased to have any interests to be affected, the mortgagees desire and seek to have the lands subjected, although they thereby take them from purchasers the *bona fides* and payment of whose purchase, the bill nowhere denies. In fact, the averment that the Raoul devisees have no longer

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any interest to be affected by the foreclosure, is equivalent to an admission that nothing is due them from their vendees.

We do not think either or both of the above excuses are sufficient to overcome the presumption of settlement or payment of the debt, from the lapse of time. Much more than twenty years—in fact, over thirty—had elapsed since the last payment on the debt, before this bill was filed. The bond, recited in and secured by the mortgage, is not exhibited to the bill, nor averred to be in existence. “That said Raoul admitted up to his death the existence of said mortgage as a valid incumbrance on the lands therein conveyed,” is a very vague averment. When, where, to whom, and how often admitted, the bill fails to show. Such averment is too indefinite to overcome the presumption of payment, even if Raoul alone was adversely interested. By a much stronger reason is it insufficient to charge his vendees, who are impliedly admitted to be purchasers for value actually paid, and who are no where charged to have had knowledge that Raoul “admitted the existence of said mortgage as a valid incumbrance on said lands.” If, by the registration of the mortgage they were constructively notified of the lien and incumbrance it created, it also notified them by its date and age that the law presumed the payment of the debt it was given to secure.—See *Coyle v. Wilkins*, *supra*.

It is not shown that motion was made for leave to amend the bill; and we need not consider whether it could have been amended, so as to cure the defects above pointed out.

Decree of the chancellor affirmed.

The State, *ex rel.* C. T. Pollard, Jr. v. Willis Brewer, Auditor, &c.

Mandamus.

1. *Statutes allowing fees must be strictly construed.*—The statutes which allow fees to sheriffs and other officers for services rendered in prosecutions by the State for criminal offences, and in executing judgments rendered in such prosecutions, give costs, and must be strictly construed.

2. *Such statutes do not embrace the sovereign, unless it is so expressly provided.*—It is a principle of the common law that such statutes do not extend to and embrace the sovereign, unless it is so expressly provided.

3. *The State, by the common law, pays no costs.*—“The king shall neither pay nor receive costs,” was the rule at common law. The same principle

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has been applied to the governments, State and Federal, in this country in civil and criminal causes.

4. *Those who accept public offices, must take them cum onere.*—Those who accept public offices which require them to render services to the State, must take the office *cum onere*. The rendition of such service is gratuitous, unless by express statutory provision compensation is fixed, and an express liability for its payment imposed on the State.

5. *The State is not liable for the payment of turnkey fees.*—The State is not liable to sheriffs for the payment of turnkey fees.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The facts are stated in the opinion.

F. C. RANDOLPH, for the appellant.—1. The court below granted the writ as to those cases where prisoners were acquitted on trial, and refused as to all other cases. Appellant thinks the court erred in this latter ruling. Section 5043 of the Code of 1876, enumerates the fees and allowances of sheriffs in criminal cases. Among others, one dollar each for committing to, and releasing a prisoner from jail. This section provides the manner in which fees shall be paid.

2. It necessarily results from this statute that the State is liable to the sheriff for his fees for services rendered in those criminal cases where they have been taxed against the defendant, the foreman of the grand jury, or the prosecutor against either of whom there has been a return of no property, or when not taxed against either of them, except when such costs are payable by the county.

3. Except section 4461 of the Code of 1876, there is no other provision of law that enlarges the liability of the county beyond the section last cited. Construing sections 5043, 5044, and 4461 together, it results that the State is liable for all fees and allowances in criminal cases, when such are not taxed against the defendant, the foreman of the grand jury, or prosecutor; or if so taxed, when there is a return of no property found, except when the defendant has been convicted and execution returned no property, when State enters a *nol. pros.* Where indictment is withdrawn and filed, or defendant dies before trial, then latter is made a charge upon the county.

4. The appellant urges that the State is liable to him for turnkey fees in all criminal cases. The costs made payable by section 4461 by the county are the costs of the officers of the court as such; and that while the sheriff is an officer of court still he is something more by virtue of being *ex officio* jailer of the county, and the turnkey fees are due to him in

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ex officio capacity, and not in his capacity purely as an officer of court.

5. A person can have two capacities; one, purely official, and the other *ex officio* in its nature; and may be entitled to fees in each capacity.—52 Ala. 98; Ib. 87. Every fee enumerated in section 5043 is not a fee or costs of an officer of court. It includes other fees, as feeding prisoners, &c. The very section recognizes the distinction between the fees due the sheriff as an officer of court, and others due him not as such officer. Section 4461 provides for fees due officers of court. Sections 5043–5044 provide for all fees due in criminal cases.

JOHN W. A. SANFORD, Attorney-General, for appellee.

1. The State is not bound to pay the salary or fees of any officer unless a statute expressly imposes this liability. If there be no law imposing such an obligation on the State, the law does not authorize the Auditor to draw his warrant on the Treasurer for the payment of such a claim. The history of the payment of the fees of the sheriff in criminal cases, shows that this claim for the payment of the turnkey fees is not well founded.—Code of 1852, § 4000; Code of 1876, § 5019.

2. According to the Code of 1852, the turnkey fees were fixed at fifty cents for each service, and were payable by the defendant on conviction; but on acquittal there was no provision for the payment of them at all.—Sections 3992, 3993. In the acts of 1857–8, p. 49, the turnkey fees were fixed at one dollar, but no change in the mode of payment was made. By an act approved January 18, 1866, Acts 1865–6, pp. 104–5, these fees were required to be paid by the State; but an act approved February 5, 1867, Acts 1866–7, p. 341, the law imposing this duty on the State was repealed.

3. The sheriff's right and power then, stood precisely as they did in 1852; the amount to which he was entitled alone was changed. The Code of 1867, which went into effect in January, 1868, referred to this matter in a note on page 798. Under that Code no sheriff claimed, and the Auditor never drew a warrant for the payment of turnkey fees. The provisions on the subject were found in the Penal Code, §§ 788, 789, were continued in the Revised Code, 1867, § 4339, and in the Code of 1876, § 5043. But the commissioners who prepared the latter Code omitted the note on page 798 of the Revised Code, and it is asserted that the omission of the note made the State liable for the turnkey fees.

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4. It is evident that prior to the 18th of January, 1866, Acts of 1865-6, p. 104, the State was not bound for such fees. By that act she was compelled to pay them till February 5, 1867. When the act imposing this burden was repealed, the burden fell off. The omission by the codifiers of the Code of 1876 to notice the repeal of the act of January 18, 1866, could not restore it. They had neither legislative nor judicial powers. Their omissions were not sanctioned by the legislature. It required them to insert all the laws of a general character, not incorporated in the Code as prepared and reported by them.—Code of 1876, p. 3.

5. Section 4461 of the Code of 1876, is an enumeration of the cases in which the "fine and forfeiture" is liable for the fees of the officers of court. But nothing is said of the payment of fees from the fund, in cases of acquittal of defendants. This omission does not impose the duty of payment of them on the State. The practice of the Auditor's office, the contemporaneous construction, and long recognized action under the statute may be considered in ascertaining its true meaning.

6. The court erred in overruling the demurrer interposed by the defendant, and erred in the judgment rendered against him. According to sections 2043, 5044 of the Code of 1876, the State is liable when on conviction of the defendant, a return of no property is endorsed on the execution, and when the fees are not payable by the county. The Code does not say that when the defendant is acquitted, the State shall pay all the fees claimed by the sheriff.

BRICKELL, C. J.—The relator, who is sheriff and *ex officio* jailer of the county of Montgomery, presented to the respondent as Auditor, for audit, allowance and payment by warrant on the State treasury, an account for fees due the relator, for committing prisoners to, and releasing prisoners from jail, charged with criminal offences. The respondent refused to audit and allow the account, and thereupon the relator applied to the judge of the City Court for a *mandamus*, to compel him to audit and allow the same. In answer to an alternative writ, the respondent appeared and demurred, assigning several causes of demurrer, which in effect deny that the claim is chargeable against the State. On the hearing, the judge of the City Court adjudged that the alternative writ be made peremptory as to the fees of the relator for committing, or releasing prisoners who had been acquitted, and vacated as to all other such fees. Each party ap-

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pealed and now assign error. The relator insisting the alternative writ should have been made absolute, as to all the fees claimed; and the respondent insisting that it should have been entirely discharged.

The claim and right of the relator is founded on the fourth clause of section 5044 of the Code of 1876, which reads: "The fees for services rendered in each criminal case must be taxed against the defendant, on conviction, or may be taxed against the prosecutor, or the foreman of the grand jury, under the provisions of section 4779 (4106); and if an execution against either of them is returned 'no property found,' or if the costs are not taxed against either of them, such costs must be paid by the State, except when they are payable by the county." The section is devoted to an appointment of the mode of paying the fees of sheriffs in criminal cases; and the preceding section defines the services for which he is entitled to fees, and the amount of such fees. The provision above quoted was first introduced into the statutes by section 789 of the Penal Code of 1866. At the time of the adoption of that Code, the particular fees now claimed, were by express statute, charged on the State treasury, when defendant was insolvent, or acquitted, or discharged.—Pamph. Acts 1865–66, p. 104. This statute creating the charge was repealed by an act approved February 5, 1867.—Pamph. Acts 1866–67, p. 347.

The statutes which allow fees to sheriffs and other officers for services rendered in prosecutions by the State for criminal offences, and in executing judgments rendered in such prosecutions, are statutes which give costs and must be strictly construed—they can not be extended beyond their letter. It is a principle of the common law, that such statutes, (as it is in reference to all general statutes,) do not extend to, and embrace the sovereign, subjecting him to disability, or to liability, unless it is so expressly provided. "The king (and any person suing to his use) shall neither pay nor receive costs," was the rule at common law; and the general words of statutes giving costs, did not include the sovereign. 2 Black. 400. The same principle has been applied to the governments State and Federal, in this country, in civil and criminal causes.—*Irwin v. Commissioners*, 1 Serg. and R. 505; *McKeeban v. Commonwealth*, 3 Barr, 151; *U. S. v. Boyd*, 5 How. 29; *Commissioners v. Blake*, 21 Ind. 32; *Prince v. State*, 7 Humph. 137. Those who accept public offices, which require them to render services to the State, must take the office *cum onere*—the rendition of such services gratuitously,

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unless by express statutory provision, compensation is fixed, and an express liability for its payment imposed on the State.

The construction of the statutory provision, to which we have referred, for which the relator contends, is, that it fixes on the State, a liability to the Sheriff, for all the fees allowed him in criminal cases, when he renders the particular service for which a fee is chargeable, unless on conviction these fees have been taxed against the defendant, and paid by him ; or imposed on the prosecutor, or foreman of the grand jury, and paid by either of them ; or such fees are payable by the county. It is not insisted the fees now claimed, for committing to, or releasing a prisoner from jail, can in this respect, be distinguished from any other fees to which the sheriff is entitled ; and if the State is responsible for these fees, it is equally responsible for all other fees which may not be taxed against the defendant, or the prosecutor, or foreman of the grand jury ; or if taxed against either of them, execution against either, is returned "no property found," and such fees are not payable by the county. It is immaterial whether the prosecution is for felony, or for misdemeanor ; and if for misdemeanor, and malicious or frivolous, it is not material, that from mere inadvertence the court neglected to tax the prosecutor or foreman of the grand jury with the costs. The State becomes in effect a guarantor to the sheriff as to his fees, of the solvency of the defendant if he is convicted ; or if he is not convicted, as an ordinary private suitor unsuccessful in a civil suit, liable for the fees. If this be the correct construction, the legislature has singularly discriminated in favor of sheriffs, whose services are often not more meritorious than those of other officers compelled to render services in a criminal prosecution. It is also a departure from the principle that the State is not to be mulcted into the costs of criminal prosecutions, because they are unsuccessful, or because of the insolvency of the defendant, for which it is difficult to assign a satisfactory reason. The legislature may make the discrimination, and may subject the State to liability for costs of unsuccessful criminal prosecutions ; and may impose on it a liability as guarantor of the solvency of convicted criminals, malicious prosecutors, and delinquent grand jurors ; or the liability for costs of a mere private suitor in a civil action. If it has done so, in plain and unambiguous terms, it is the duty of courts without reluctance to give effect to

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its will. But is this the proper construction of the statutory provision we are considering?

The preceding section, which defines the services for which the sheriff is entitled to fees, and fixes a liability on the State for particular fees, if the defendant is acquitted, or on conviction proves insolvent—and for victualling a prisoner while in jail, a liability if he is insolvent, though he has not been tried. It also fixes a liability on the county, for a fee in no event chargeable against a convicted felon; and a liability for another fee, if the accused is acquitted, or on conviction proves insolvent. The section also allows a *per diem* and certain expenses for conveying a convict to the penitentiary; which by a clause of the next section, immediately preceding the clause under consideration, is expressly made payable by the State Treasurer on the warrant of the Auditor. Whenever it is intended to fix a liability on the State for any of the fees or allowances to sheriffs, the intention is very clearly expressed. For instance, it is said: “for victualling prisoner in jail, to be paid by the defendant on conviction, or by the State if he is insolvent, or is not convicted.” The fees and allowances for the removal of a prisoner, on a change of venue, are “to be paid by the defendant on conviction; and by the State if he is acquitted or insolvent.” The statutes do not declare generally, that on a conviction, the defendant shall be liable for costs, unless it is expressly provided, the costs are to be otherwise paid, yet such is the manifest purpose. The services for which each officer is entitled to charge fees, and the fees for each service are specified, followed by a provision, that on conviction they are to be taxed against the defendant; and a provision that they may be taxed against the prosecutor or foreman of the grand jury, and collected by execution.

In pursuance of this plan of taxing the defendant with the costs as an incident to a judgment of conviction, the provision in reference to the fees of sheriffs is framed. The first member of the single sentence composing the clause, declares “the fees for services rendered in each criminal case must be taxed against the defendant on conviction.” There is no room to doubt that it was intended by this part of the clause, to fix on the defendant a liability for all taxable costs, as a mere incident to a judgment of conviction, whether the conviction is of felony or a misdemeanor. The next member of the clause declares, “or may be taxed against the prosecutor, or the foreman of the grand jury, under the provisions of section 4779, (4106).” This would

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at first seem to be the alternative of the preceding member ; yet it certainly is not. It refers to costs in cases of misdemeanor only, and costs which cannot be imposed if there is a judgment of conviction. The section of the Code referred to, authorizing a prosecutor, or the foreman of the grand jury to be taxed with costs, applies only to indictments for a misdemeanor, and in no event to indictments for felony. Nor is the prosecutor or foreman of the grand jury taxable with the costs, if there is a judgment of conviction. There must be an acquittal of the defendant, relieving him of all liability for costs, before either of them can be taxed with the costs. If there is such judgment, the malice or frivolousness of the prosecution and the neglect of the foreman of the grand jury, produce damage, for which it is the purpose of the statute to hold them responsible. The first member of the sentence consequently embraces all fees which may be taxed against the defendant on conviction, whether such fees are incurred in a prosecution for a felony, or for a misdemeanor. The second is narrower in meaning, and embraces fees in prosecutions for misdemeanor only, and which can not be taxed against the defendant—fees which are taxable against the prosecutor, or the foreman of the grand jury, only in the event of his acquittal.

When reference is had to section 4779 of the Code, it is obvious this sentence is merely a reaffirmation of the liability of a prosecutor or foreman for costs which that section imposes—and the liability would have existed to the same extent it now exists, if the sentence was omitted. The sentence consequently neither creates nor enlarges a liability.

The next and concluding member of the clause is ; “and if an execution against either of them is returned ‘no property found,’ or if the costs are not taxed against either of them, such costs must be paid by the State, except when they are payable by the county.” It may be these words stood alone, they are broad enough to charge the State with the payment of all costs, not payable by the county, or not taxed against and paid by a defendant, or by the prosecutor, or the foreman of the grand jury. The juster construction seems to us, is to refer them to such costs as by other provisions of law are made payable by the State absolutely, and can not be taxed against the defendant on conviction ; or to such costs as may be taxed against the prosecutor or foreman of the grand jury, in the event of an acquittal, and which if convicted the defendant would be required to pay, and if he was insolvent, the State would be liable to pay, excepting

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such costs as the county is liable to pay. Thus construed it is, as is the preceding member of the sentence in reference to the liability of the prosecutor or foreman of the grand jury, a reaffirmation of the liability imposed on the State by other parts of the statute. A reaffirmation not necessary as to any other officer than the sheriff, for to no other officer is the State liable for any fees. The State is bound to pay, and there is no liability on the convict to pay, the expense of his transportation to the penitentiary. The words last quoted are broad enough to embrace this expense, which preceding parts of the statute had fixed on the State. So, the expense of the removal of a prisoner on a change of venue are embraced in these general words, though the liability of the State therefor, in the event of his acquittal, or of his insolvency if convicted, is fixed by preceding parts of the statute. And so of the costs of victualling the prisoners. These are services in which a sheriff is compelled to incur expense in the performance, and compensation to him in any event, it is just, and the policy of the law to afford. In this respect, these services are distinguishable from the services the clerk and other officers are required to perform, and distinguishable from other services, the sheriff is required to perform. It is these fees which it is intended shall be paid by the State, (except when payable by the county,) if the defendant is not taxed with them, nor the prosecutor or foreman of the grand jury,—or it being taxed against either one he proves insolvent. The fees payable by the county are similar to these—fees not only for services rendered, but the service necessarily involves expense—as the execution of a criminal with all its incidents; and the removal of prisoners when there is no jail in the county, or it is insufficient. The statutory provision thus construed, is relieved from a discrimination in favor of sheriffs except when the service involves expenses not incurred, by other officers in the rendition of service; and it conforms to the general intent manifested in the statutes, and to the conservative principle of the common law, not to mulct the State in the costs of criminal prosecutions because they are unsuccessful, or because of the insolvency of the defendants. The general scope and object of the statute, and we mean the entire chapter of the Code devoted to fees in criminal and *quasi* criminal cases, of which this particular provision forms a part, must be consulted; and such a construction given this provision as will make it harmonize with all other parts and with the spirit and policy of the whole. If we adopted the construction on which the relator insists,

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the State is under a liability to the sheriff, not incurred to any other officer; and the spirit and policy of the statute—not to impose such liability except when the sheriff in the performance of duty is subjected to expense, is departed from without any satisfactory reason. We hold therefore the State was not liable to the relator for the fees claimed—that the fees referred to in this clause of the statute for which the State is liable are the fees for which an express liability is declared by other parts of the statute, and that it was not the intent of the legislature by this clause to enlarge this liability. If this is not the proper construction, the repeal of the act of January 18, 1866, which charged these particular fees on the State treasury, was vain and useless.

The judgment of the City Court must be reversed, and a judgment here rendered discharging the alternative mandamus at the costs of the relator in this court, and in the City Court.

The Montgomery and West Point Railroad Co. v. Branch, Sons & Co.

The Rights of the Creditors of a Private Corporation.

1. *The legislature can not deprive the creditors of a corporation of their rights.*—The creditors of a corporation who are secured by mortgages of its property, acquire therein rights of which they can not be deprived even by an act of the legislature.

2. *When the charter of a corporation provides that a surrender of its franchises shall not affect the rights of creditors, the clause will be presumed to be for the benefit of unsecured creditors.*—When the charter of a corporation authorizes it to buy the property of another, and provides that such purchase or surrender of the franchises shall in no way affect the rights of the creditors of the company which sells, it will be presumed that such a clause was introduced for the benefit of the unsecured creditors.

3. *A private corporation is a trustee for the benefit of its creditors.*—A private corporation is a trustee of its property for the payment of its creditors, and afterwards for the benefit of its stockholders. During its existence and operation, its general creditors have no lien which will entitle them to sue it, in a court of equity; but its property can be subjected to the payment of its debts by actions at law.

4. *When a corporation can not be made answerable at law, a court of equity will seize its property for the benefit of its creditors.*—If without the payment of its debts, the property of a corporation is distributed among its stockholders, or transferred for their benefit to third persons, who are not *bona-fide* purchasers without notice; or if the corporation should be dissolved, or become so disorganized that it can not be made answerable at law, then a

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court of equity will lay hold of its property and effects, and apply them to the payment of its creditors.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

The Montgomery and West Point Railroad Company, a corporation of the State of Alabama created by an act of the legislature, passed in the year 1843, had in the year 1870, one hundred and seventeen miles of railroad, and other property of great value. It was indebted at the same time to the amount of about two-thirds of that value. Its stock sold in the market at thirty cents on the dollar. Of its debt, the sum of about \$766,000 was due upon and secured by first mortgage bonds, which had been issued in 1866; \$254,000 were secured by a second mortgage, and the rest was due by income bonds, chiefly, and in part was floating debt.

The Western Railroad Company of Alabama, another corporation of this State, was chartered in 1860 to build and operate a railroad from Montgomery westward to Selma, a distance of about 45 miles; and the road was completed in 1870. This company was in debt to an amount about equal to, if not exceeding, the value of its property. The Georgia Railroad & Banking Company, and the Central Railroad & Banking Company, of Georgia, were indorsers of the bonds of the Western Rail Road Company.

The same companies, or persons who were officers of them, were owners also of enough of the stock of the Western Railroad Company, and became, in 1870, owners of enough of the stock of the Montgomery and West Point Railroad Company to control the management of these latter, and to elect the officers thereof.

Mr. Charles T. Pollard was president of both of the Alabama companies.

By the 21st and 22nd sections of the charter of the Western Railroad Company, it was authorized to "contract for the purchase of the Montgomery and West Point Railroad," with all its "outfits and property of every description." And the president and directors of the Montgomery and West Point Railroad Company, "upon such purchase being made by and with the consent of a majority of the stockholders in value," were authorized to surrender their charter to the Comptroller of Public Accounts; after which the railroad so purchased was to be incorporated with that of the Western Railroad Company, "and be governed by the provisions of this act in all respects as if said road . . . had been

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constructed under its provisions." The statute further proceeds as follows: "The purchases herein provided for, or the surrender of the franchises, shall in no way affect the rights of the creditors of the company . . . whose road may be purchased; and its separate existence shall be continued as to all the rights and remedies of creditors; and the president of the company incorporated by this act shall be held in law, as to service of process, as the president of the other company."—Acts of 1859–60, pp. 259, 260.

In June, 1870, at a meeting of the stockholders of the Montgomery and West Point Railroad Company, the president (Mr. Pollard), after a statement of the condition of the company, and of the necessity it was under of raising money for repairs, proposed "to sell to the Western Railroad Company the Montgomery and West Point Railroad, with its outfit and property, the Western Railroad Company to assume the payment of all the outstanding debts of the Montgomery and West Point Railroad Company, and to issue its stock, share for share, in exchange for the capital stock of the Montgomery and West Point Railroad Company. It is really," (he continued) "only the consolidation of the two companies under the name and charter of the Western Railroad Company."

This was the proposal, and in recommending it to the stockholders, Mr. Pollard expressed the opinion that the company could not raise the money it needed, except by issuing third mortgage or income bonds, which would have to be sold at so low a rate that the policy would bankrupt the company. "This may be avoided," (he added) "by the sale of the road as I propose, to the Western Railroad Company, and the issue by that company, after the purchase, of second mortgage bonds for such an amount as may be required to fund the entire debt of both companies not provided for, and for the repair of the Montgomery and West Point Railroad. . . . If the plans now submitted to your consideration are adopted, I believe in three years the company will be restored to its position before the war of a dividend-paying railroad."

In response, the stockholders passed a resolution approving of the recommendation made by the president in his report, to sell the railroad and property of this company to the Western Railroad Company, and authorizing the president and directors to make such sale, "under the provisions of the twenty-first and twenty-second sections of the charter of the Western Railroad Company upon the following terms:

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The Western Railroad Company to assume all the obligations of this company and to issue the capital stock of the Western Railroad Company share for share for the capital stock of this company now outstanding."

The board of president and directors of the Western Railroad Company expressed its agreement to the purchase by a resolution adopted the first day of August, "in accordance," as it says, "with the resolutions of the stockholders in convention this day, and under the authority of the twenty-first and twenty-second sections of the act incorporating this company." And the resolution declares that the company makes the purchase "and hereby assumes the payment of all the debts, obligations, and responsibilities of said Montgomery and West Point Railroad Company, and hereby authorizes and instructs the president to issue the capital stock of this company share for share for the capital stock of the Montgomery and West Point Railroad Company now outstanding, and to take possession of said Montgomery and West Point Railroad, with its outfit and property, on the first day of September; on which day said railroad, its outfit, and property will be incorporated in this company."

Other resolutions, not alleged to be by authority of the stockholders, were then adopted by the same board of directors, authorizing the issue on the 15th of September, 1870, of the company's bonds for \$1,200,000 of that date, to be made payable on the first of October, 1890, and secured by "a mortgage on the railroad, outfit and equipment of this company, including the railroad, outfit and equipment of the Montgomery and West Point Railroad Company this day purchased." And it was further by the same board of directors, "*Resolved*, That the president is hereby authorized to exchange for and take up the second mortgage bonds of the Montgomery and West Point Railroad Company now outstanding for \$254,000 with a portion of the \$1,200,000, which he is authorized to issue so that that the second mortgage for \$1,200,000 shall be the only second mortgage on the entire road, outfit and equipment of the company, and there shall be left only a prior lien to said second mortgage, a first mortgage of the Montgomery and West Point Railroad Company for \$750,000, and a first mortgage of the Western Railroad Company of \$600,000."

On the first day of September, 1870, the Western Railroad Company took possession of the purchased property without any deed; Mr. Pollard being president of both

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companies. The surrender was also made of the charter of the other company to the State.

The bonds and mortgage, or trust-deed in the nature of a mortgage, for \$1,200,000, were afterwards executed; and the bonds were indorsed or guaranteed by the Georgia companies. Some of the debts of the Montgomery and West Point Railroad Company were paid with them, but the greater part of the bonds were used in paying the debts of the Western Railroad Company, and in improving the road, &c. In 1870, at the instance of the Georgia companies, the trustees in the mortgage last aforesaid, filed a bill to have the entire road, its equipments, and all the property and franchises of the Western Railroad Company sold under that and the other older mortgages, made by both companies before the consolidation. And according to the record, a sale was made of the entire property together, under the decree of the Chancery Court of Montgomery county, in 1875.

The complainants in the present suit, were creditors and holders of unsecured income bonds of the Montgomery and West Point Railroad Company, before and at the time of the consolidation, and still are. But they were not, nor was that company, or any of its unsecured creditors made parties to the suit for a sale under the mortgages. And the complainants now claim that they are entitled to be paid out of the property of their original debtor, and had a lien thereon superior to that created by the trust-deed of September 15, 1870, executed by the Western Railroad Company after its purchase thereof.

On the final hearing of the cause, the court decreed "that the lien of the complainants is superior to that of the holders of bonds under the mortgage executed by the Western Railroad Company of Alabama after the purchase of the" Montgomery and West Point Railroad "by the former, so far as the property of the said Montgomery and West Point Railroad Company is concerned."

H. C. SEMPLE, and D. S. TROY, for appellants.—1. To construe a statute properly, we must look at the history of the country relating to this object, that we may discover the "reason of it, or the cause which moved the legislature to enact it."—Smith's Com. on Stat. Const. § 493; and this reason of the law is not to be confounded with the mind of it, which the reason helps us to discover.—Smith's Com. § 493.

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2. Why was this power to purchase and sell given to their corporations by statute? Simply because being artificial persons they could do no act even as to their own property not authorized by statute. Natural persons owning the road could have made such arrangements for the purchase and sale of the road as their interests suggested. The statute has no broader scope than to relieve the artificial persons from the disabilities incident to their corporate character.

3. The complainants can claim relief only on one of three grounds, viz: *First*, that the act authorizing the sale limited the right to sell and purchase to a sale and purchase subjecting the property sold to charge or lien in favor of all the creditors of the selling company without respect to the intention of the parties to the contract, and independent of the agreed price or value of the property; *second*, because, by the terms of the contract of sale, a lien was reserved by the selling company; *third*, because, under the circumstances of sale, the law implies a lien in favor of creditors of the dissolved corporation, at the moment of its dissolution, in the nature of a vendor's lien.

The first ground has been considered. The second ground, the facts repel the idea that such a reservation was designed either by seller or buyer as against the contemplated mortgage; and as to the third ground, we answer the corporation was never dissolved, and *is a party to the suit*; and the law never constructively raises a lien when the facts show the parties considered the question and actually waived it. The idea of a vendor's lien is that the vendee and subsequent purchasers from him with notice are trustees for the vendor, till purchase-money is paid; but if the vendor has agreed to take other security or waived the lien, there is no room for a constructive trust.—Story's Eq. §§ 1217–1219—and Lord Eldon in *Macreth v. Simmons*, 15 Vesey, 350, says: "It depends on the circumstances of each case whether the court is to infer that a lien was intended to be reserved."

4. The sole question then is whether the mortgage made of the transfer of property in controversy had the same effect on the rights of appellees as if it had been made before the transfer. The lien or equitable mortgage in favor of the appellees as unsecured creditors is of the Montgomery and West Point Railroad Company is asserted on four distinct grounds, viz; *First*, that the Western Railroad Company agreed to pay the debts of the Montgomery and West Point Railroad Company, in consideration of the transfer of the property, and this charge constituted a lien upon the prop-

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erty; *second*, that the property, or a portion of it, being real estate, is liable for the purchase-money, and payment of the debts of said corporation is part of the price, and appellees, as holders of such debts, have a vendor's lien on the property; *third*, that the Montgomery and West Point Railroad Company is a dissolved corporation, and appellees as creditors of it have a lien on its assets; and *fourth*, that the statute which authorized the sale and purchase preserved all the rights and remedies of the creditors of the Montgomery and West Point Railroad Company, and this in effect secured to them a lien on the property of the corporation.

5. It was entirely competent for the legislature to dissolve the corporation for certain purposes, and to continue its existence as to others.—*Rex v. Passmore*, 3 Term Rep's, 241, *et seq.* An authorized merger or transfer of corporate franchises to a new corporation by legislative act is not such a dissolution as will subject its assets to administration in a court of equity for the benefit of creditors.—Aug. & Ames on Corp. § 780—and a *fortiori* when a transfer is in accordance with a statute which continues the old corporation as to all the rights and remedies of its creditors, such a result will not follow.—26 Conn. 544; 28 Conn. 289; 21 Ill. 451; 25 Ill. 353; 46 N. Y. 644.

6. The statute which authorized the transfer did not confer on the creditors of the Montgomery and West Point Railroad Company any right of lien which they did not possess before the transfer of the property. On the contrary, it is expressly declared that the purchase shall in ~~no~~ way "affect the rights of the creditors of the company" whose road is purchased, intending thereby that the rights of creditors should be neither increased nor diminished. Hence, we respectfully submit, that the *lien* of appellees, so far as it is claimed to arise from this legislative enactment, is not even colorable. From the very nature of a corporation it is impossible that its general or unsecured creditors can have a lien on its assets which could be asserted in the event of its insolvency against a purchaser from it in good faith while solvent. The property in controversy was purchased from this corporation in good faith when it was solvent, and its unsecured creditors had then no rights which authorized them on its subsequent insolvency to impeach the title of the purchaser at such a sale.

7. The power to mortgage its property was expressly conferred on the Montgomery and West Point Company by its charter, and the legislature expressly reserved the right to

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alter, modify or repeal the charter of the Montgomery and West Point Railroad Company; and where this right is reserved, the power of the legislature to amalgamate or consolidate corporations and to remit the creditors of each against the consolidated company is settled.—1 Redf. on Railw. p. 620, § 142, par. 6; 35 Wis. 425—578-9; 13 How. 307. Such consolidation or transfer of property is but the the substitution of another trustee supposed by the legislature to be more capable of carrying into effect the original objects of incorporation.

8. The power to mortgage the property in good faith for corporate purposes, one of which was to raise money to pay unsecured creditors, was not destroyed by amalgamation. This power remained somewhere, and but for the provisions of the act might have been exercised by the Montgomery and West Point Railroad Company after the consolidation. 11 Ind. 398; 2 Redf. on Railw. p. 595, § 254. Therefore the appellees had clearly no lien on the property in controversy by mere operation of law, which would prevail over a sale and mortgage pursuant to it, made in good faith for corporate purposes and in accordance with legislative authority. The case in 42 Mo. 63, fully sustains this proposition.

9. Under the facts shown, it is not consistent with good faith on the part of the appellees now to insist that the lien in their favor is superior to the mortgage which they assisted in creating. As against this mortgage and those claiming under it they are clearly estopped.—49 N. Y. 336; 33 Ala. 509; 28 Ala. 321; 30 Ala. 408. If any of the complainants is not entitled to recover, the bill must fail.—1 Brick. Dig. p. 750, and authorities cited.

10. But we insist, upon well settled principles, the bill must be defeated on its merits. It may be conceded that when the purchaser agrees to pay the debts of the seller he takes the property charged with the payment of the debts, the creditors have a vendor's lien on the property sold; but neither the *charge* nor the *lien* which are both implicated from the sale can prevail against a mortgage contemplated, intended, and provided for by both seller and purchaser in the contract itself.

WATTS & SONS, and PETTUS, DAWSON & TILLMAN, for appellees.—1. Under the facts of the case several important questions arise, viz:

1st. Was there any trust in behalf of the unsecured creditors of the Montgomery and West Point Railroad Com-

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pany on the property transferred to the Western Railroad Company take this property subject to payment of the debts of the Montgomery and West Point Railroad Company? Was there not an equitable lien in favor of creditors on all the property thus transferred to the Western Railroad Company?

2d. Were Morris and Lowry *bona fide* purchasers for value without notice of the equities of the complainants, who are holders of unsecured bonds of the Montgomery and West Point Railroad Company, made in 1866 and 1870, before August, 1870?

3d. Whether the unsecured creditors of the Montgomery and West Point Railroad Company have not a vendor's lien on all the real estate belonging to the Montgomery and West Point Railroad Company at the time of the transfer in September, 1870. The creditors of this railroad company independent of the statute have an equitable lien.—3 Grattan, 148. Immediately upon the dissolution of a corporation, its creditors have a *lien* upon all its property. This trust is enforced against the property in the hands of all persons except *bona fide* purchasers for value without notice.—Perry on Trusts, §§ 241-242; 2 Story Eq. § 1252; Aug. & Ames Corp. § 599-600 and note; 8 Pet. 281; 3 Mason C. C. Rep. 308; 25 Ala. 566; *Huckabee v. Smith*, 53 Ala. The act of the legislature authorized the Western Railroad Company to purchase the Montgomery and West Point Railroad and its property, and when such purchase was made the charter of the latter was to be surrendered. It became, *ipso facto*, dead—dissolved in law. It became dead as to all power of transacting business, and only existed as to the rights and remedies of its creditors.

2. When property is transferred to another on condition of paying some third person a debt, the latter acquires a lien on the property which can be enforced in equity. A trust is thus created on the property for the payment of the debt. 3 Grattan, 148; 2 Paige, 15; 7 Paige, 421; 6 Paige, 383. It matters not whether such condition be expressed or implied. 11 Paige 334, and authorities *supra*. Such a trust may be created by deed as well as by will.—2 Story Eq. §§ 1244-46; 3 Merivale, 382; 2 Spence Eq. 287; 7 Johns. Ch. 57; 6 Ala. 589; 23 Ala. 519. By the statute which authorized one railroad company to buy and the other to sell, coupled with the contract of purchase, created a trust in behalf of all the creditors of the Montgomery and West Point Railroad Company on all property so transferred, and the Western Railroad

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Company took the property subject to this trust. A creditor of a dissolved corporation has a lien on all its property which he can enforce in a court of equity.—*Huckabee v. Smith*, 53 Ala. and authorities *supra*.

3. There is another ground upon which complainants are entitled to relief. The agreement to pay the debts of the Montgomery and West Point Railroad Company as a part of this consideration of the purchase, gives these complainants a lien on the real estate which belonged to the Montgomery and West Point Railroad Company. The debts constituted a part of the purchase-money.—48 Ala. 509; 1 Otto, 667. In this case no deed of conveyance was made to the Western Railroad Company. There must be a deed to convey title to real estate. An estoppel will not convey the legal title. 18 Ala. 182.

4. There can be no difference between a corporation and a natural person in this respect. Indeed if there be, a corporation has less powers than an individual.—48 Ala. 45; 43 Ala. 656; 28 Ala. 337; 42 Ala. 717; 49 Ala. 75. He who buys only an equitable title can not be considered a *bona fide* purchaser for value. To be such a purchaser he must have bought of one having a legal title.—2 Story Eq. § 1502; Sugd. on Vend. p. 211; 12 Serg. & Rawle, 389; 4 Johns. Chan. 46; 1 ib. 575; Leading Eq. Cases, p. 163; 7 Cranch, 34, 48; 7 Peters 252; 10 Peters 177; 8 Ala. 866. A vendee is held to examine the title of his vendor, and to know every fact which an examination would disclose.—18 Ala. 741; 42 Ala. 617; 4 Otto, 429.

5. Notice to Morris was notice to the persons whom he represented. He had implied notice. Implied notice of a trust is as binding as express notice, and an implied trust is as binding as an express trust.—4 Grattan, 482. A purchaser has notice of everything which appears on the face of the title purchased.—1 White & Tudor Eq. Cases, 153. The fact that the appellees have recovered a judgment against the Western Railroad Company which is unsatisfied, does not oust the jurisdiction of chancery to enforce the trust.—16 Wend. 460; 2 Ired. Ch. 316; 54 Ala. 246.

6. When two corporations consolidate their property, each owing separate debts before the consolidation, the separate property of each is liable first to pay the separate debts of each, and the surplus only is applied to the payment of the joint or common debts.—20 Ired. 457, 464. The same rule is applied to partnerships.—Story on Part. § 363; 19 Ala. 596; 24 Ala. 628; 27 Ala. 661; 29 Ala. 172. Corporations

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can not legally form partnerships without special authority given them by statute.—Aug. & Ames on Corp. § 272; 7 Wend. 419; 3 Dessausure 557; 1 Sumn. C. C. Reps. 46. Even simple contract creditors may file a bill to assert an equitable lien against a dissolved corporation, and especially when a trustee is violating his trust and appropriating the trust fund to alien uses.—25 Ala. 337.

WADE KEYES, for H. B. Plant.—1. The act of the General Assembly which authorized the sale by one of the corporations, and the purchase by the other, was merely an enabling act. It certainly did not intend to give the Montgomery and West Point Railroad Company power or rights as a vendor which an individual vendor has not; nor did it intend to give the Western Railroad Company any exemption from the liabilities of an individual purchaser. There can be no controversy as to the existence of a vendor's lien on the real estate in favor of the creditors, when the consideration of the purchaser is the payment of the vendor's debts.—1 Otto, 672; *Buford v. McCormic*, December term, 1876. The law does not presume that a man has waived his rights. "To constitute a waiver there must be a clear, unequivocal and decisive act of the party."—3 Yerg. 286; 9 Haskill, 697; Redf. Railw. Cases (supplement), 73-4.

2. The Montgomery and West Point Railroad Company sold the whole of its property and surrendered its charter, and that was a dissolution, and nothing more nor less; and it is a perversion of terms to call it anything else.—Brice *ultra vires*, p. 538, 546. It is unnecessary to say anything in relation to a *bona fide* purchaser for a valuable consideration without notice in this or any other connection, as none of the elements of such a defence exist in this case.—31 Ala. 275.

3. The spirit of what was said by MANNING, J., in *Meyer v. Johnston*, 53 Ala. pp. 319-20, seems applicable to this case: "If such a mere accession of authority and change of name be allowed to operate a dissolution of one corporation and the creation of another in its stead, there would be danger that such changes by a process little different from that of simple development, would become not unfrequent devices by which bodies politic would continue to cast off the legal and equitable obligations from which the statute under which the arrangement in this instance was made, expressly declared that not anything in it contained should have the effect to release said company."

4. There are really no grounds for an elaborate brief in

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this cause—not one at all proportionate in size to the amount involved. The principles upon which the appellees rely are too plain for serious contest. The defences are so unsubstantial that the very effort to grasp them proves them to be shadows. And it is apparent that instead of asking equity to “ungear,” the appellees ask equity to drive the transaction on, harnessed as it is, to its legitimate consummation.

MANNING, J.—Those creditors of the Montgomery and West Point Railroad Company who were secured by mortgages of the company's property, by those contracts acquired rights therein, of which they could not be deprived even by an act of the legislature; since any law which a State may enact, that would impair the obligation of a contract, is void under the constitution of the United States. When, therefore, in the twenty-second section of the charter of the Western Railroad Company, it was enacted, in reference to the purchase of the property of the Montgomery and West Point Railroad Company, that “the purchases herein provided for, or the surrender of the franchises shall in no way *affect the rights of the creditors* of the company,” the presumption is that the clause was introduced for the benefit chiefly of the unsecured creditors, persons to whom such a provision might be of advantage, rather than for those whose claims were already protected by deeds creating inviolable specific liens. And that this was the understanding of the contracting parties themselves is pretty clearly indicated by a passage in the report of Mr. Pollard, president of both of the companies, when, in addressing the stockholders of one of them, in reference to and before their union, in regard to what the other, the Western Railroad Company, ought to do,—he speaks of “the issue by that company, after the purchase, of second mortgage bonds for such amount as may be required to fund the entire debt of both companies, *not provided for*, and for the repair of the Montgomery and West Point Railroad.”

The stipulation, also, in the resolution of the other company, by which it expressly “assumes the payment of all the *debts, obligations, and responsibilities* of the Montgomery and West Point Railroad Company,” while persuasive evidence that the former understood its own charter as precluding it from becoming the absolute owner of the Montgomery and West Point Railroad Company, except upon that condition, also conclusively proves that the Western Railroad Company, and its wealthy backers, the two Georgia compa-

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nies were convinced that the purchase would be a good one, on those terms.

2. It is argued, though, that the enactment declaring that the purchase of the railroad and other property of the West Point Company, and the surrender of its franchises, shall in no way affect the rights of its creditors, was intended only to preserve their rights to sue at law as they before might have done; and that the succeeding clause, continuing that company's separate existence, "as to all the rights and remedies of creditors," was intended only to enable them to bring such actions against it, by having process therein served on the President of the Western Railroad Company. The legislature did not (they say) mean to embarrass the transfer of the railroad and other property from one company to the other, by incumbering the same with liens which did not previously exist: but the Western Railroad Company acquired the property in the same plight that the Montgomery and West Point Company held it, and succeeded to the power of the latter to create a lien, by a second or third mortgage to secure bonds of a new issue, (that for \$1,200,000), the holders of which would be entitled to enforce this security against and to the prejudice of the holders of the unsecured debt of the Montgomery and West Point Railroad Company. Let us examine these propositions.

No doubt, we suppose, is entertained by anybody, that the West Point road and property were acquired by the Western Railroad Company, in accordance with the intention of the legislature, when it enacted the twenty-first and twenty-second sections of the charter of the latter. The road purchased extends from Montgomery eastwardly, reaching Georgia by the main line at West Point, and, by a branch, at Columbus. A charter had previously been granted, to build a railroad from Selma westwardly, to the Mississippi State line; and the road and property of this company also, the Western Railroad Company was authorized by the same sections of its charter, to acquire; the design being to have one continuous railroad running from Georgia across the State of Alabama to the Mississippi State line in the direction of Jackson,—under the control of the Western Railroad Company and its charter,—and that the other companies when their roads were acquired should be disbanded. The charter of the Western Railroad Company provided that this corporation should be composed of the subscribers for its stock, and those whom they might at any time thereafter associate with them, their successors and assigns (Section 3);

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and the stockholders and the capital stock might be added to and increased from time to time, until the latter should amount to \$5,000,000 (Section 8).

It was evidently contemplated that the railroads of the other companies, if purchased at all, would be obtained by an agreement on their part, to unite their roads with that of the Western Railroad Company, and by their stockholders becoming stockholders in it. The word, *sale*, or *sell*, is not used at all in this connection, in the statute. The Western Railroad Company is authorized to "contract for the purchase" and to "purchase" those roads, or either of them; the word *purchase* being used as it often is in law, in the sense of acquiring by contract or consent, from another. And after the purchase, this company (the act proceeds to say), "may sue for and recover *in its name*, all *debts, dues and demands* from *any debtor* to said company whose roads may be so purchased:" which also contemplates a fusion or union of the companies and their stockholders.

In harmony with the evident intent of this enactment, the Western Railroad Company contracted for the purchase, and purchased, the railroad and other property of the Montgomery and West Point Company, by the agreement of the two, that the road, property, capital and effects of the latter should be added to those of the former, and that the stockholders of the latter should surrender their charter and become stockholders, to the same amount, in the Western Railroad Company: the transaction being, what Mr. Pollard defined it—"really, only the consolidation of the two companies under the name and charter of the Western Railroad Company." Thus, apart from the agreement by that company to pay "the debts, obligations and responsibilities" of the other, there was no consideration for the purchase so made,—except the issue of stock of the Western Company to the stockholders of the Montgomery and West Point Company; the only compensation actually made being received by them as stockholders. In other words, while they were thus paid with shares of the capital of the other company, no fund was created, or put at the disposal of the Montgomery and West Point Company, as the equivalent and substitute for the property it transferred, out of which it could be coerced to pay, or could pay one dollar to any of its creditors.

What, then, would it avail those creditors to bring actions at law against the Montgomery and West Point Railroad Company? If writs of sequestration or execution should be issued against it, where would there be any "goods and

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chattels, lands and tenements" that could be seized by virtue thereof? Or should writs of *mandamus* be sued out for any purpose in such causes,—where would a board of directors be found, or persons authorized to perform the functions of such a body, on whom these writs could be served?

True, the act provides that the president of the Western Railroad Company "shall be held in law, *as to service of process*, as the president of the other company or companies, whose roads, works and property may be purchased." But he has no other capacity whatever in relation to the defunct Montgomery and West Point Railroad Company, and may have never had any connection with it during its existence, as a stockholder or otherwise. Nothing in fact remained of that corporation, except the name. And anything more vain and useless—than an action at law against it,—anything more absurd,—it would be difficult to conceive. We must, therefore, conclude that something more substantially beneficial to the creditors, than such suits would be, was intended by the clause of the statute professing to secure rights to them. What were the rights that might be so preserved?

3. A private corporation chartered to transact business, is a trustee of its capital, property and effects—first, for the payment of its creditors, and afterwards for the benefit of its stockholders. True, while it continues in life and operation according to the design of its charter, its general creditors have no specific lien which would entitle them to sue it in a court of equity. Yet during that time, its property and effects, which the law presumes would not be dishonestly put out of reach, are liable and might be subjected to the payment of its debts by actions at law against it, if not paid voluntarily. But if leaving its debts unpaid, its capital, property and effects are distributed among its stockholders, or transferred for their benefit to third persons who are not *bona fide* purchasers without notice,—and still more, if the corporation be dissolved or become so disorganized that it can not be made answerable at law, then a court of equity will pursue and lay hold of such property and effects, and apply them to the payment of what it owes to its creditors. *Mamma v. Potomac Co.* 8 Peters 28; *Dummer v. Wood*, 3 Mason, 308; *St. Mary's Bank v. St. John, Powers & Co.* 25 Ala. 536; *Huckabee v. Smith*, 53 Ala. 191. A suit having that object is the most direct, if not the only efficient means of asserting and vindicating any right of the creditors, in such a case as the present: and by holding that it is not maintainable, we should refuse to give any real effect to the sav-

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ing clause in the statute, if such a clause was necessary to enable them to maintain the suit. Certainly, if by virtue of the act, one of the contracting companies might transfer all of its ample property and effects out of which its creditors ought to be paid, to the other and weaker company, in consideration of its admitting the stockholders of the former to become shareholders of its capital and property thus augmented, and might then—by a sort of legal suicide—slip out of existence, leaving those creditors to sue at law the surviving company, which they had never dealt with, or accepted as their debtor, their rights would be very seriously affected thereby.

4. There is no question of innocent purchaser for value without notice, in this case. No party-defendant can claim or does claim that character. The existence of the debts was not only known to the Western Railroad Company, but it expressly assumed to pay them all. And such an agreement coupled with the acquisition in the same transaction, of all of the property out of which they were payable, and a consequent dissolution of the debtor company to which the promise was made, would itself probably create a lien on the property acquired, as well as bind the Western Railroad Company personally, for the payment of these debts. *Vanmeters' Ex'rs v. Vanmeters*, 3 Grattan, p. 162.

We have no doubt, therefore, that the complainants in this cause, creditors of the Montgomery and West Point Railroad Company, have a lien for the payment of its debts to them, on the road and its appurtenances and other property that belonged to that company, superior to the lien created by the trust-deed or mortgage of September 15, 1870, executed by the Western Railroad Company.

5. There is no substance in the objection that Branch, Sons & Co. were stockholders at the time of these transactions. If there was any evidence that they participated in or approved of the transaction we have considered, it must be presumed that they did so understanding its legal effect; and by that, as we have seen, the rights of creditors were intended to be preserved.

The contention of appellants that in taking and stating the accounts between the parties, and in the decree, it ought to be provided that the amount of debt of the Montgomery and West Point Railroad Company, which was paid with the bonds issued by the Western Railroad Company, should be allowed and paid out of the proceeds of the sale of its property, before any payments should be made to complain-

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ants, is not well founded. It ignores the fact that the Western Railroad Company expressly agreed to discharge all the debts, obligations and responsibilities of the other company—and that it was upon the condition that it should do so, that it acquired a property which, at the time, was worth much more than the debts chargeable upon it. The purchasing company can not now, nor, if it is not still the owner, can those claiming under it, because the property may have in their hands, gone down in value,—repudiate the obligations of the contract by which it was obtained.

We think there was no error prejudicial to appellants, in the proceedings below.

Let the decree of the chancellor be affirmed.

STONE, J., not sitting.

[On application for rehearing.]

MANNING, J.—We have carefully considered the application for a rehearing, on the last topic discussed in the opinion in this cause,—that, namely, concerning the division of the proceeds of the sale of the Montgomery and West Point Railroad and equipments. The principal argument upon which this contention of appellants is founded, rests on the assumption, that it was one of the terms of the contract between the two companies, that the Western Railroad Company should, after acquiring the property of the Montgomery and West Point Company, execute its bonds for the \$1,200,000 mentioned, and its mortgage on the entire consolidated road and its appurtenances and equipment, to secure payment of them. We find no basis for this assumption in either the pleadings or the evidence. We infer from them both that there was no such provision in the contract. The terms proposed and accepted were clearly stated in the resolutions of both of the contracting parties at the meetings of the stockholders of each: and no such stipulation is set forth in either of them, although the members may have individually believed that the future policy suggested in the report of the president to the West Point Company, and in the resolutions of the board of directors of the Western Company, would be wise, nothing on that subject was introduced into the resolutions to sell and purchase, which were adopted at the respective stockholders' meetings. And that it was not the purpose of the board of directors of the Western Company to do this, is inferrible from the recital in

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its resolution to purchase, and of the terms of the purchase, that it was adopted in accordance with the resolutions of the stockholders in convention this day:" while subsequent resolutions of the board relating to the issue of those bonds and execution of the mortgage, do not contain any such reference to the instruction of a stockholders' meeting. They appear to have been passed by the board of directors, in the exercise of their own powers of administration, and might have been rescinded or changed at its pleasure at any time. No liability was thereby incurred to anybody. And if there had been, the creditors of the other company had no part or voice in those negotiations. All the ingenious argument erected on the assumption referred to, is without any foundation.

But the able counsel for appellants further insist that, if it was not a part of the contract between the two corporations, that the Western Company should, execute the bonds and mortgage and thereby give to the holders of them rights in all that property superior to those of the unsecured creditors of the Montgomery and West Point Railroad Company,—yet these creditors knew that it was in contemplation, that such bonds and a mortgage to secure them, should be executed, and were afterwards executed; and that a large number of these creditors were paid therewith or with the money thereby raised; and that not having objected to the transaction, those who had not been paid, ought to be considered as having ratified it, and be estopped from claiming priority over the holders of these bonds.

"Whatever trusts or liens" (say those gentlemen) "arose by the transaction between the two corporations in favor of the Montgomery and West Point Railroad Company, were common to all of that class, and upon what principle can it be held that a portion of this class can accept the benefit of a mortgage on the property of both corporations, while another portion of the same class, who stand by and see it done, may assert against this mortgage a superior lien to it? We have seen that these unsecured creditors had a right to share the benefits of this mortgage. There is no allegation that Morris and Lowry, the trustees, or the parties who advanced their money on the bonds or any body else is to blame because the appellees did not, like their more fortunate or more diligent companions, get their debts funded under the mortgage, or paid in full with the money raised upon it."

But what right had the creditors of the Montgomery and West Point Railroad Company to ratify or refuse to ratify

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the mode in which the board of directors of the Western Railroad Company chose to transact the business of their own corporation? What reason had such creditors,—in view of the opinion of Mr. Pollard that the latter company should by such an issue of mortgage-bonds, provide for “the entire debt of both companies not provided for”—to anticipate that they would *not* “get their debts funded under the mortgage or paid in full with the money raised upon it?” And where is there any allegation or suggestion in this cause, that they have any of them refused to be “paid in full with money raised upon” said mortgage, or by any other means to which the Western Railroad Company might resort in performance of the duty it undertook, when it declared that it “hereby assumes the payment of all the debts, obligations and responsibilities of said Montgomery and West Point Railroad Company?”

We are not able to perceive any such inconsistency or injustice as counsel imagine, in holding, that those of the unsecured creditors of the Montgomery and West Point Company, or of the second mortgage creditors of the same company, who released their debts against it, in exchange for the bonds of the issue of \$1,200,000 of the Western Railroad Company, indorsed as they were by two wealthy Georgia companies, are not entitled to a division of the proceeds of the property which belonged to the Montgomery and West Point Company with the creditors of that company.

Those who made this exchange, ceased to be creditors of the latter company, and obtained securities which they preferred, and which were probably more valuable than those they parted with. It is not they who complain of being in a worse condition by that transaction, or of injustice on the part of the appellants, who were defendants below—but appellees, the suing creditors, who complain that they have not been paid either by those indorsed bonds or otherwise.

Let the application for rehearing be overruled.

STONE, J., not sitting.

[Cunningham v. Thomas.]

Cunningham, Executrix, v. Thomas, Administrator.

Petition to Vacate a Decree on the Final Settlement of an Estate.

1. *After the lapse of forty days no one has the right to be preferred as an administrator.*—After the expiration of forty days from the death of the intestate, no one has a right to be preferred as an administrator of the estate.

2. *The failure of an administrator to execute a bond does not vacate the appointment.*—The failure of the administrator to execute bond in the penalty prescribed, is an irregularity, but it does not render the appointment void.

3. *A decree on irregular proceedings can not be vacated on petition at a subsequent term.*—If the proceedings on the final settlement of an administration are not void, but irregular, the decree rendered thereon can not be set aside on petition at a subsequent term.

APPEAL from the Probate Court of Conecuh.

Tried before the Hon. F. M. WALKER.

On the 29th day of September, 1876, Mrs. Susan J. Cunningham, as executrix of the last will and testament of James Cunningham, deceased, filed in the court of probate of Conecuh county the following petition:

"To the Hon. Francis M. Walker, Judge of Probate of said county:

Your petitioner, Susan J. Cunningham, would respectfully state and aver, that she is now, and has been since the first day of January, 1874, a citizen of the city and county of Mobile, said State, and the widow of the late James Cunningham, who departed this life on or about the 16th day of November, 1874, in said city of Mobile, and that she qualified, in the Probate Court of Mobile county, as the executrix of the last will and testament of said decedent on, to-wit, the 24th day of February, 1875, and that letters testamentary on the estate of said decedent were issued to her on, to-wit, the 24th day of February, 1875, from which time, until now, she has exercised and discharged the duties as said executrix, and is now the executrix of said estate.

Petitioner would further state and aver, that her testator, the said James Cunningham, was, at the time of his death, administrator *de bonis non* of the estate of C. J. Stallworth, deceased, which was then being administered in the Probate

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Court of Conecuh county, Alabama, and that afterwards, to-wit, on the 29th day of December, 1874, and more than forty days after the death of said Cunningham, Joseph H. Thomas made and filed his petition for letters of administration to be granted to him on the estate of the said C. J. Stallworth, deceased, upon the ground that he was a creditor of said estate.

Petitioner would further state and aver, that the names, ages, conditions and residences of the heirs and légatees of the estate of the said Stallworth, are Mrs. C. S. Brantly, the widow of C. J. Stallworth, deceased, since married to one Brantly, whose Christian name is unknown to petitioner, and others unnecessary to mention.

Petitioner further states and avers, that the said Mrs. C. S. Brantly has not filed in the office of the probate judge of Conecuh county her relinquishment of the right to act as the administratrix of the estate of the said C. J. Stallworth, deceased, and that the said J. H. Thomas is not now, and was not on the 29th day of December, A. D. 1874, a creditor of said estate, as petitioner is informed and believes; that he was not entitled, under any of the provisions of the statute in such cases made and provided, to administer on said estate.

Petitioner further states and avers, that at a special term of the Probate Court in March, 1875, an order was granted appointing said Thomas administrator *de bonis non* of the estate of said Stallworth, deceased, provided the said J. H. Thomas first filed in the said Probate Court his bond in the penal sum of four thousand dollars, conditioned and payable, according to the statute in such cases made and provided, &c.

And petitioner states and avers, that said Thomas has never filed said bond in manner, and form, and conditioned, and payable and for the penal sum as required in said order.

Petitioner further states and avers, that on or about the 5th day of January, 1875, letters of administration on the estate of the said Stallworth were issued to the said J. H. Thomas as the administrator *de bonis non* of said estate, and that he entered upon the duties thereof without bond, as required by law in such cases made and provided, and that said Probate Court did not, at that time, or previously to that time, grant an order appointing said Thomas administrator *de bonis non*, as aforesaid.

Petitioner further states and avers, that on the second day of November, 1875, said Probate Court did state, pass, audit and allow an account against her as the executrix, as aforesaid, of the said James Cunningham, deceased, and rendered

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a decree thereon in favor of the said J. H. Thomas, for the sum of two thousand three hundred and forty-one and 29-100 dollars, on the second day of November, 1875, and issued an execution on said decree against her as executrix, as aforesaid, and placed the same in the hands of the sheriff of Mobile county on, to-wit, the 30th day of November, 1875.

Petitioner further states and avers, that no citation was served upon her, as the law directs in such cases, ten days before the making of said settlement, that no publication was made for three successive weeks in the *Conecuh-Escambia Star*, published in said Conecuh county, that no guardian *ad litem* was appointed to represent the interest of said minor heirs of the estate of the said C. J. Stallworth, deceased, and that the names, ages, condition and place of residence of the said heirs and legatees were not stated as required by the statute in such cases made and provided.

Petitioner further states and avers, that her testator, the said James Cunningham, never received any assets of the estate of the said C. J. Stallworth, deceased, until a few months before his death, and that previously to that time he expended large sums of money in law-suits, and otherwise, for the benefit of said estate and to enforce the collection of all the assets that ever came into his hands, and that the said testator, previously to receiving said assets, made large advancements in money and otherwise to the said Mrs. C. S. Brantly, then Mrs. C. S. Stallworth, widow of the said C. J. Stallworth, deceased, and her minor children aforesaid, for their comfort, maintenance and support; and petitioner states and avers that she, as the executrix of the estate of said Cunningham, is entitled to large credits, against said estate of C. J. Stallworth, deceased, as above stated, that said settlement and decree thereon in Probate Court against her as aforesaid, together with the interest thereon and costs of court, that said judgment and decree was rendered against her as executrix, as aforesaid, before the expiration of eighteen months after the death of her said testator, and that gross injustice was done petitioner as executrix as aforesaid on said settlement.

In consideration of all the premises above set forth, and the facts as they appear from the exhibits hereto attached, petitioner would respectfully pray that the said decree against her, as aforesaid, on final settlement of the accounts of the said testator as administrator, as aforesaid, be set aside and rendered null and void, and that the executions issued thereon be quashed.

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Petitioner would further pray that the letters of administration issued to said Thomas, as above set forth, be set aside and revoked, because the same were improvidently granted to the said Thomas, as shown in said petition and exhibits hereto attached.

Petitioner would further pray that letters of administration on the estate of the said C. J. Stallworth be granted to the next of kin of said Stallworth, and that the said Mrs. Brantly have notice of said settlement, and an opportunity to be heard, and that a guardian *ad litem* be appointed to represent said minor heirs.

Petitioner further prays that after said settlement is set aside, and an administrator appointed, she be allowed to file her account and vouchers and make a full and fair settlement of the administration of her testator, as the administrator as aforesaid, and as in duty bound your petitioner will ever pray."

The foregoing petition was filed on the 29th of September, 1876.

The defendant demurred to the petition, and assigned several grounds, which were overruled, but the following ground was sustained, viz:

3d. "Because it sets forth in the body of the petition, asking and showing causes why the decree against her should be set aside, and concludes with a prayer for the removal of this administrator from the administration of the said estate, and asking that the next of kin be appointed."

To the action of the court, in sustaining this ground of demurrer, the petitioner excepted.

The petitioner, by leave of court, amended the petition by striking out the following: "Petitioner would further pray that the letters of administration issued to said Thomas, as above set forth, be set aside and revoked, because the same are improvidently granted to the said Thomas, as shown in said petition; and would further pray that letters of administration on the estate of said C. J. Stallworth be granted to the next of kin of said Stallworth. And that the said Mrs. Brantly have notice of said settlement, and an opportunity to be heard, and that a guardian *ad litem*, be appointed to represent said minor heirs."

The said defendant, J. H. Thomas, demurred to the amended petition, and assigned the following grounds of demurrer, viz:

1. "Because said petition comes too late, viz: that it was

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not filed within four months subsequent from the rendition of said judgment.

2. "Because said petition was not filed within the time prescribed by statute 2814 of Revised Code of Alabama.

3. "Because she is a debtor, as executrix of James Cunningham, to the estate of C. J. Stallworth, and she can not undertake to assert that a guardian *ad litem* was not appointed, because that looks to an adverse interest and contradistinction to the one she attempts to assert, being in conflict with her own interest and to the minor heirs of said estate."

The court sustained the demurrer and dismissed the petition. And to this action of the court the petitioner excepted.

GEORGE R. FARNHAM, for appellant.—1. The court erred in sustaining the third ground of demurrer to the original petition. It did not specify any objection to any matter of substance. It was a general demurrer, and should have been overruled.—Rev. Code, § 2656 ; 33 Ala. 110 ; ib. 659 ; 34 Ala. 485 ; 35 Ala. 259 ; ib. 722 ; 37 Ala. 560.

2. The facts alleged in the petition show that the administrator *de bonis non* was improvidently and illegally appointed. In such a case it is the duty of the court to revoke the letters.—Revised Code, §§ 1987–2003 ; 33 Ala. 570 ; 1 Williams Ex'r, 507, *et seq.*

3. The demurrer to the amended petition does not specify any substantial ground of objection, and should have been overruled.—Revised Code, § 2656. It is a plea in bar without verification rather than a demurrer.

4. The facts alleged in the amended petition show that the decree which is assailed was absolutely void upon its face, and the prayer of the petition was to set aside said decree.—40 Ala. 247 ; ib. 596 ; 46 Ala. 491 ; 47 Ala. 192.

5. As to the legal sufficiency of the facts alleged in the petition, see 16 Ala. 100 ; ib. 652 ; 24 Ala. 516 ; 37 Ala. 362 ; 27 Ala. 701, and cases *supra* ; 1 Brick. Dig. 791, § 796, *et seq.* ; 39 Ala. 294.

BOWLES & STEARNS, for appellee.—1. Although these proceedings may abound in irregularities and errors, yet the court had full jurisdiction of the matters, and had the right to make just such settlement, and in the manner substantially pursued in this case. The decree is not void, and can not be set aside in the manner attempted in this proceeding by the appellant.—Revised Code, § 2165, *et seq.* ; 16 Ala. 100 ;

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24 Ala. 516; 44 Ala. 317; 42 Ala. 628, and authorities cited.

2. The case made by the appellant fails to show the proceedings were void and the decree a nullity, and therefore can not complain of the order dismissing his petition.

STONE, J.—If the averments of the petition in this case be true, the estate of Mr. Cunningham was seriously injured by the decree rendered in favor of Thomas, administrator *de bonis non* of the estate of Stallworth, against Mrs. Cunningham, as executrix of Cunningham's will. Still, we feel bound to affirm the decree of the Probate Court, sustaining the demurrer, and dismissing the petition. The proceedings, though possibly irregular in some respects, were not void; and hence they could not be vacated in a collateral proceeding by petition.

When Thomas was appointed administrator *de bonis non*, more than forty days—in fact, years had elapsed since the death of Mr. Stallworth. No one, then, had the right to claim the administration under the statute.—Code of 1876, §§ 2350–1; *Davis v. Swearingen*, 56 Ala. 31. No cause is shown why Thomas was disqualified or incompetent to hold the trust, and the motion to vacate the appointment on that account was properly overruled.

The failure of the administrator to execute bond in the penalty which had been previously prescribed, was mere irregularity, and did not render the appointment void.—*Ex parte Maxwell*, 37 Ala. 362.

The final decree rendered against Mrs. Cunningham recites enough to give the court jurisdiction to state an account against her, and to audit and decree upon the account, after it was stated. The recital affirms that Mrs. Cunningham had proper notice that the account had been filed, of the day set for settlement, examining and auditing the account, &c. The decree then proceeds in regular and formal manner to ascertain the balance in the hands of her testator unaccounted for, and decrees the same against the estate of her testator in her hands to be administered. This is sufficient in a collateral attack, such as this is.—Code of 1876, § 2590, *et seq.*; *Blackwell v. Vasthinder*, 6 Ala. 218; *Howard v. Howard*, 26 Ala. 682; *Lyon v. Adam*, 31 Ala. 234; *Dow v. Whitman*, 36 Ala. 604.

The appointment of the guardian *ad litem*, and his acceptance, are sufficient in a probate court proceeding, even if the

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present petitioner stood in a position which would authorize her to raise the objection.—*Stabler v. Cook*, 57 Ala. 23.

The decree of the Probate Court is affirmed.

Hammons *et al.* v. The State, use, &c.

Forfeiture of Bail.

1. *Allowance of bail was not a right at common law.*—Admission to bail at common law was not a matter of right, but rested in a sound judicial discretion, and its allowance was the exercise of judicial power. In this State it has been controlled by constitutional and statutory provisions.

2. *In cases of misdemeanor, bail is matter of right.*—On an indictment for a misdemeanor, bail is a matter of right, and on the sheriff in whose custody the defendant may be, is devolved the duty unconditionally of discharging him on sufficient bail. On an indictment for a felony if the defendant does not give bail in open court, it must make an order and cause the same to be entered of record, fixing the amount of bail required. This the sheriff may take in vacation and discharge the defendant.

3. *Bail taken on Sunday is valid.*—An undertaking of bail entered into on Sunday, during vacation, is sanctioned by the law and is perfectly valid.

4. *The liability of bail is not under absolute control of the court.*—The statute does not clothe the court with an absolute power of discharging or fixing the liability of bail; nor does it confer the power to determine questions of fact without the intervention of a jury, on which the validity of the undertaking or the liability may depend.

5. *The court can determine the sufficiency of the excuse for a default.* The power of the court is to determine the sufficiency of the excuse for the default of the principal at a former term. If the excuse be adjudged sufficient, the conditional judgment must be set aside without costs. This power is intended to be exercised only when the principal appears, submits to the orders of the court, and can be held to answer the indictment.

6. *Parties may sign an undertaking of bail with their initials or mark.* Parties to such an undertaking may employ initials, a mark or any other designation, and will be bound as if they had written their names in full, if such was their intention.

APPEAL from the Circuit Court of Escambia.

Tried before the Hon. JOHN K. HENRY.

The defendants, George P. Hammons, W. W. Hammons, R. F. Hammons, S. L. Lowery, William Owens, and James C. Garrett, on the 10th of July, 1869, entered into an undertaking of bail, conditioned for the appearance of George P. Hammons at the next term of the Circuit Court of Escambia county, to answer the charge of murder. The said Hammons failed to appear. At the fall term, 1875, of the Circuit Court of Escambia county, the State of Alabama, for the use of Monroe county, instituted a suit against the

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said defendants on the undertaking of bail, which was in these words:

"The State of Alabama, Monroe county. We, George P. Hammons, W. W. Hammons, R. F. Hammons, S. L. Lowery, William Owens, and James C. Garrett, agree to pay the State of Alabama two thousand five hundred dollars, unless the said George P. Hammons appear at the next term of the Circuit Court of Escambia, and from term to term thereafter, until discharged by law, to answer the offence of murder.

"G. P. HAMMONS,

"W. W. HAMMONS,

"R. F. HAMMONS,

his

"S. L. x LOWERY,

mark

his

"WILLIAM x OWENS,

mark

"JAMES C. GARRETT.

"Approved, July 10, 1869.

"J. A. SIMMONS, Sheriff."

To the complaint which was filed in the case, the defendants pleaded the general issue, and a number of special pleas. These pleas were: 1. That the instrument sued on was executed on Sunday; 2. That the bond was "executed and delivered on Sunday, and was not a contract for the advancement of religion, or for the performance of some work of charity, or in a case of necessity, and is invalid and void." The defendants Lowery and Owens each pleaded that the "said instrument was not signed or subscribed by them, or either of them, except by each making his mark, and that neither of their marks was attested by a subscribing witness who writes his own name as witness; and that the said instrument was not signed or subscribed by their writing their names thereto." To all of these pleas except the general issue, the plaintiff demurred, and the court sustained the demurrer.

The defendants then pleaded that upon the failure of the said George P. Hammons to appear according to the condition of the bond, a judgment *nisi* had been rendered against the said defendants; and that a writ of *scire facias* had been issued and executed upon them. At the return term of the said writ, they had pleaded that the recognizance was void, because it had been entered into on Sunday; and that the said recognizance, which is the foundation of the said judg-

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ment, was executed, accepted, and the sufficiency of the sureties determined by the approving officer, and the said George P. Hammons was released from the prison on Sunday; and that at a subsequent term of the court the said conditional judgment was set aside and vacated.

To this plea the plaintiff demurred, and the court sustained the demurrer.

On the trial, the plaintiff offered in evidence the bond or undertaking of bail which is above set out. The defendants objected to its introduction, but the court overruled the objection, and the defendants excepted.

The defendants then offered to introduce L. W. Posey and Charles Hammons, "to prove that said bond offered in evidence was executed, delivered, accepted, and approved by the sheriff of Monroe county, on Sunday, at the instance of the said sheriff, and that the prisoner was then, on Sunday, discharged." The plaintiff objected to this evidence; the court sustained the objection, and the defendants excepted. "The court, at the request of the plaintiff, charged the jury that if they believed the evidence, they must find for the plaintiff," and the defendants excepted.

GAMBLE & BOLLING, and J. W. POSEY, for appellants.

1. The first question to be determined is the sufficiency of the plea of former recovery. Its test is that it shows conclusively that the judgment made between the same parties in the same court, was on the merits of the case.—1 Stew. 20; 2 Stew. & Port. 341; 16 Ala. 17. This plea complies with all the requirements of the law, and can not be seriously questioned.—37 Ala. 306.

2. The demurrer should have been overruled, because it was general, and did not in any manner set out wherein the plea was insufficient.—Revised Code, § 2656; 42 Ala. 672; 42 ib. 208; 34 Ala. 485; 35 Ala. 259; ib. 722; 40 Ala. 578. The defendants, Lowery and Owens, pleaded that they had not signed the bond, except by marks, without an attesting witness, and to this plea a demurrer was improperly sustained. It did not comply with the requirements of the Code in the case of such signatures. Nor can it be said that the requirement was met by the act of approval by the sheriff.—35 Ala. 110. The court sustained the demurrer to the several pleas, and thereupon invaded the province of the jury, who alone can find whether or not the necessity did exist.—18 Ala. 280. But aside from this, the plea was certainly good.—9 Ala. 198. In this case the court say "that

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a note made on Sunday to procure a discharge of the principal maker, who had been arrested on a charge of bastardy, is void," simply because of its execution on Sunday. That case and this both depend on the law of contract.

3. It is beyond controversy that all contracts of whatever description are void if executed on Sunday, unless it should come within one of the exceptions contained in the Revised Code, § 1882.—5 Ala. 467; 9 Ala. 198; 10 Ala. 566; 11 Ala. 885; 13 Ala. 360; 41 Ala. 132. An action can not be maintained on a bond which is executed on the Lord's day, neither from necessity nor charity.—13 Metc. 284. A recognizance taken on Sunday is void.—33 Maine Rep. 539. To create a legal necessity there should be at least great danger of some loss or wrongful injury that could not be otherwise avoided or repaired.—20 Ark. 289; 2 Parsons Cont. pp. 760-1. But the case in 9th Alabama, above referred to, seems decisive of the one at bar.

4. It is insisted that the cases of *Hooper v. Edwards* in 18th and 20th Alabama Reports, sustain the position of the appellees. In that case great and inevitable loss was threatened.—18 Ala. 284. But here no loss, injury or destruction could have been incurred by waiting till the succeeding day. Necessity is a strong term, being compulsory, and making the contrary of a thing almost impossible.—2 Bouvier's Law Dict. p. 212.

HERBERT & BUELL, for appellee.—1. The demurrer to the pleas was properly sustained. Under the decision in *Merritt v. Phoenix*, 48 Ala. 87, the approval of the signature by the sheriff was sufficient attestation. The plea is bad aside from such attestation. The plea avers that each made his mark, and does not aver that one or both of the pleaders could not write.—52 Ala. 196. The plea was not sworn to, and did not put in issue the fact of signature, but its legal effect. The court properly held that the allegations of the plea were not a defence to the action.—52 Ala. 154; 56 Ala. 514.

2. The demurrer was sufficiently specific to test the sufficiency of the plea.—15 Ala. 722. There is no judgment or order of the court discharging the defendants from the bond. And if there had been a final judgment, and afterwards set aside, such a judgment would have been no bar to a subsequent action on the bond.

3. It was a matter of necessity that the bond should be executed on Sunday. In *Flagg v. Millbury*, 4 Cush. 243, the court says: "A moral fitness or propriety of the work and

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labor done under the circumstances of any particular case may well be deemed necessity within the statute.”—6 Mass. 76. In order to render a contract void, because executed on Sunday, it must appear that the party seeking to enforce it had “some voluntary agency in consummating the contract on that day.”—21 Verm. 99. In *Shippey v. Eastwood*, 9 Ala. 198, the court held the plea, that the note was made on Sunday, to be good. There was no necessity for the settlement of the bastardy case on that day. There was nothing in that case that showed the defendant was restrained of his liberty.

BRICKELL, C. J.—1. “Bail signifies a guardian, or keeper, &c. A man bailed is, where any one arrested or in prison, is delivered to others, as his bail, who ought to keep him to be ready to appear at a time assigned, or otherwise to answer for him. And, therefore, the bail may keep the person committed to them in their custody for their indemnity. Or, if he be at large, they may re-seize him and bring him before a justice to find new bail, or to be committed to prison. And this they may do upon a Sunday.”—2 Com. Dig. 3; *Cain v. State*, 55 Ala. 170. Before the statute, 29 Car. 2, c. 7, all ministerial acts upon a Sunday were lawful, though not judicial; as an arrest by an officer upon process. *Reid v. State*, (in manuscript.) The statute excepted from its operation, arrests in cases of treason, felony, or breach of the peace.—7 Com. Dig. 399. Admission to bail, at common law, whether the prisoner was in custody on an accusation of misdemeanor, or of felony, was not matter of right, but rested in a sound judicial discretion, and its allowance was the exercise of judicial power.—1 Bish. Cr. Pr. § 693, *et seq.* In this State it has been controlled by constitutional and statutory provision. The Bill of Rights of all our constitutions, has contained substantially the same provision: “That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident, or the presumption great; and that excessive bail shall not in any case be required.” The policy of the statutes is, and has been, to afford the citizen every facility for obtaining a discharge from custody, before conviction, on giving sureties for his appearance to answer the accusation preferred against him. On an indictment for a misdemeanor, no order of a judge, no adjudication of a court, is essential to the admission of a defendant to bail. It is matter of right, and on the sheriff in whose custody he may be devolves the duty uncon-

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ditionally of discharging him on sufficient bail. The duty of the sheriff is purely ministerial, and for the manner of its exercise, he stands answerable, as he is for the exercise of other ministerial duties.—Code of 1876, § 4830. If the indictment charges a felony, and the defendant does not give bail in open court, the court must make an order, and cause the same to be entered of record, fixing the amount of bail required; *and the sheriff has authority, and it is his duty, to discharge such defendant, in vacation, on his giving bail, as required in such order.*—Code of 1876, § 4831. Not only on the court is conferred this power of delegating to the sheriff authority, and imposing the duty of taking bail in cases of felony, but the judges of the city and circuit courts, the only courts in which there can be prosecutions by indictment for felony, are required during term time, by order entered on the minutes, to fix the amount of bail required in all cases of bailable felonies pending in the court, and direct the sheriff to take bail accordingly in vacation.—Code of 1876, § 4849. These and other statutory provisions to which reference can be made, show the solicitude of the General Assembly, to furnish the citizen charged with an offence which under the Constitution is bailable as matter of right, facilities for obtaining discharge on bail. When bail is given, the defendant is still regarded, as being transferred from the custody of the officer of the law, to the custody of his sureties, whose right to re-seize the principal, and exonerate themselves by his surrender, is declared.—Code of 1876, § 4859.

2. The principal in the present case, was in custody on an indictment for murder, and the Circuit Court in which the indictment was pending, adjudging in term time, he was entitled to bail, fixed its amount, and directed the sheriff to take in vacation an undertaking for his appearance, with sufficient sureties. The appellants joined him in the undertaking, taken by the sheriff in vacation, which they now insist was executed on Sunday, and is void as violation of the statute, which prohibits all contracts made on Sunday, unless for the advancement of religion, or in the execution, or for the performance of some work of charity, or in case of necessity.—Code of 1876, § 2138. What effect this statute has on the common law principle, that the acts of ministerial officers done on Sunday are valid, is not a question which ought, in the present case to be considered and decided to its full extent. By no just interpretation, can the statute be extended to the acceptance by a mere ministerial officer of an undertaking of bail, which the statutes, and the order of court

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command him to take, leaving nothing to his discretion, except the sufficiency of the sureties tendered. If the principal had been at large, it would have been the duty of the sheriff to have arrested him. Or, if he had been on bail, his sureties could have surrendered him. Or, if an exigency existed requiring it, the sheriff could have transferred his custody to another, or could have changed the place of it. The acceptance of the undertaking on Sunday, is no more than a transfer of the custody, a change of its place. The bail, instead of the sheriff, became the keepers. It would be repugnant to the policy of the statutes, which are framed with so much care to afford the largest opportunity for relief from actual imprisonment, on giving bail, to construe the statute referring to contracts made on Sunday, as lessening the opportunity and prolonging the imprisonment.—*Rice v. Commonwealth*; 3 Bush (Ky.), 14. The exception in the statute, "in case of necessity," has been heretofore held by this court, to embrace a contract made by a creditor to secure his debt from an absconding debtor.—*Hooper v. Edwards*, 18 Ala. 280; *S. C.* 25 Ala. 528. The Supreme Court of Illinois, in *Johnston v. People*, 31 Ill. 469, held the taking of a recognizance of bail from one charged with a criminal offence, was a *work of necessity*, within the exception of their statute. In *Flagg v. Inhabitants of Millbury*, 4 Cush. 244, the Supreme Court of Massachusetts, say: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute." There seems to us no ground on which the defence against the undertaking, because of its execution on Sunday, ought to be sustained, and if sustained, it would diminish a right of personal liberty, the statutes have been carefully framed to secure. The case of *Shiffey v. Eastwood*, 9 Ala. 198, was a mere private contract between individuals, in which officers of the law had no agency, and which was not expressly authorized by statute, and ordered by a court of competent jurisdiction.

3. The statute provides that when an undertaking of bail is forfeited by the failure of the defendant to appear, a conditional judgment must be entered against him and his sureties for the sum expressed in the undertaking, of which notice must be given and that it will be made absolute, unless they appear and show cause against the same. On the appearance of the parties, if sufficient cause is shown, to be determined

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by the court, the conditional judgment must be set aside; but if the excuse is not sufficient; or if they fail to appear, the judgment must be made absolute, for the entire sum expressed in the undertaking, or any portion thereof, according to the circumstances. The court is required to hear excuses for defaults, on application, at any time, when not engaged in other business; and if the conditional judgment is set aside, no costs are to be imposed.—Code of 1876, §§ 4863, 4868. The defendants pleaded in bar, that at a former term of the court, a conditional judgment was rendered against them, and on notice, they appeared at the next term and made answer that the undertaking was executed on Sunday, and thereupon the court set aside the conditional judgment. Was this a final judgment pronounced, and which the court had authority or jurisdiction to pronounce, discharging the bail? In form, and in words, it is a mere vacation of the conditional judgment, not adjudging the validity of the undertaking, or the liability of the bail, and we can not suppose it was intended by the court to have any larger operation. The statute does not clothe the court with an absolute power of discharging or fixing the liability of bail; nor does it confer the power to determine questions of fact without the intervention of a jury, on which the validity of the undertaking, or the liability, may depend. The power the court can exercise, is that of passing on the sufficiency of the excuse for the default of the principal at the former term. If that excuse is adjudged sufficient, the conditional judgment must be set aside without costs. If it is not entirely satisfactory—if it is shown that the default was not unmixed with negligence, or a wilful disobedience of the duty of appearance, the judgment may be accommodated to the particular circumstances of the case, and made absolute for the whole, or a part of the sum expressed in the undertaking as to the court may seem just.—*Cain v. State*, 55 Ala. 170. The appearance of the principal, and his submission to the orders of the court is contemplated, in all cases in which the court exercises the power of setting aside the conditional judgment, or of rendering it absolute for less than its whole amount. It is not contemplated, the power shall be exercised in cases in which he does not appear, and the court can not hold him to answer the indictment. The judgment pleaded in bar, was a mere order vacating the conditional judgment, without an adjudication of the validity of the undertaking, or of the liability of the bail, and is not a bar to the present action.

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3. The execution of the undertaking by Lowery and Owens was not put in issue by a verified plea, and without such plea there could be no inquiry into that fact. Parties to such an undertaking may employ initials, a mark, or any other designation, and will be bound as if they had written their names in full, if such was their intention.—*Wimberly v. Dallas*, 52 Ala. 196.

Judgment affirmed.

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Bill of Injunction.

1. *The holder of a note secured by mortgage is regarded as a bona fide purchaser.*—A creditor who permits a debtor to substitute for his note upon which is a solvent surety, a note made by the debtor alone, secured by mortgage must be regarded as a *bona fide* purchaser, when the note is assailed as usurious by one, who is neither the personal representative of the debtor, nor his surety.

2. *A mortgagee of land does not lose his lien by taking a mortgage executed by husband and wife.*—The mortgagee of land who holds it under such circumstances as will make him a *bona fide* purchaser against the mortgagor's wife, attempting to subject the land to the payment of money belonging to her statutory separate estate, invested in it, does not lose the lien of such mortgage by taking a second mortgage executed by the husband and wife to secure the payment of their note, extending the time for the payment of the debt.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. HURIOSCO AUSTILL.

Sallie E. Wilson, a married woman, filed, by her next friend, John George, a bill of complaint in the Chancery Court of Butler county, against Thomas A. Knight and Solomon D. Wilson, praying for a writ of injunction and other relief.

The bill of complaint alleged that the complainant was married in 1867, in the State of Georgia, to Solomon D. Wilson, and was still living with him as his wife. At the time of the said marriage both the complainant and her husband were citizens of the said State, and resided therein until 1869. During their residence in the State of Georgia, the father of the complainant gave her a tract of land situated in that State. Before the removal of the complainant and her husband from Georgia to the State of Alabama the said

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land was sold for eighteen hundred dollars. Of this sum one thousand dollars was paid, and the remaining eight hundred dollars was secured by a note. The father of the complainant subsequently advanced the money on the said note, and it was transferred to him. The father of the complainant died in 1870. After his death she received from his estate an additional sum of eleven hundred and forty-four 25-100 dollars.

On or about the second day of October, 1869, said Solomon D. Wilson purchased of Thomas A. Knight the land described in the bill of complaint, except about forty-five acres. The said Knight afterwards sold the forty-five acres so reserved to one William Yelldell, but never made a deed of conveyance to him. Subsequently the said Wilson purchased from said Yelldell the forty-five acres of land sold to him by the said Knight, "at and for the price of one thousand dollars, and executed his note for the purchase-money. The said Wilson paid the said note to Yelldell, with nine hundred and sixty dollars belonging to the complainant, and the remainder due was paid with Wilson's own money. By an agreement between Yelldell and Knight, the said Knight conveyed the said forty-five acres to Wilson.

The purchase-money agreed to be paid by Wilson to Knight for the land, exclusive of the forty-five acres, amounted to twenty-five hundred dollars. On the 12th day of February, 1872, Wilson executed a mortgage on all the land, including the forty-five acres bought of Yelldell, to the said vendor, to secure the payment of twenty-three hundred and twenty-four dollars alleged still to be due.

On the sixth day of March, 1873, the mortgage above described was cancelled, and another was executed by Wilson to secure the payment of nineteen hundred and forty-seven dollars due by promissory note. Of this amount the bill alleged, two hundred and fifty dollars was not for the purchase-money of the land, but was to cover a balance on account of other dealings between Wilson and Knight; and that upon this, usury was charged, as well as upon the note given for the purchase-money of the land. It denied that nineteen hundred and forty-seven dollars was due on said purchase, but averred that the said vendor had advertised the premises for sale under the authority of the mortgage to collect this sum. The complainant also alleged that exclusive of the money invested in the forty-five acres, the sum of eleven hundred and forty-four 25-100 dollars of her statutory separate estate had been expended in permanent improve-

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ments on the land conveyed by Knight to her husband ; and that the complainant had a right to have a resulting trust declared in her favor on the said land to the extent of the money of her statutory separate estate invested in the said improvements. The bill alleged that the said Knight knew that Solomon D. Wilson "was a poor man, and had no means of any considerable amount, except the said money of the statutory separate estate of the complainant."

The bill prayed for a writ of injunction to restrain Thomas A. Knight from selling the premises under the power of sale granted in said mortgage ; that a resulting trust in said land be declared and enforced in favor of the complainant, and the land be sold, and the money belonging to the statutory separate estate of the complainant invested in the land and improvements be paid to her from the proceeds of the sale.

The answer of the defendant, Solomon D. Wilson, admitted many of the allegations of the bill, and averred that the note which he first gave to Knight, for the purchase-money of the land, was signed by John H. George, as his surety. It also averred that he told Knight that he was poor, and that the money used in the purchase of the land belonged to the complainant, who had received it from her father. The answer also alleged that of the sum of twenty-three hundred and twenty-four dollars, for which the said promissory note was given, only sixteen hundred and eighty-eight 22-100 dollars, including usurious interest thereon, was for the purchase of the land ; and that the balance of the amount named in the note was for borrowed money, and merchandise and interest at the usurious rate of twelve and a half per cent. per annum.

The defendant, Knight, answering the bill of complaint, denied that he had any knowledge that the money used by Wilson in the purchase of the land belonged to the statutory separate estate of the complainant, or that it did in fact belong to her. He averred also that one John H. George signed the note mentioned in the bill as surety of Wilson ; and admitted the execution of a mortgage to him by Wilson for twenty-three hundred and twenty-four dollars, which was then legally due. This defendant admitted the cancellation of the above described mortgage on the sixth day of March, 1873, and that he took from the complainant and her husband, the said Wilson, another mortgage on that day, to secure the payment of the purchase-money for the land ; and alleged the mortgage was executed for this purpose alone.

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“He denied that there was any usury in said note dated March 6, 1873, and alleged that only eight per cent. interest for 1870 and 1871, was charged said S. D. Wilson; that about the time said mortgage of February, 1872, was executed, said Wilson applied for an extension of time for the payment of the balance due for the said land: and this defendant at first declined, because, as he told Wilson, he needed the money, and if he did not collect it, he would be compelled to pay his commission merchant at the rate of eight per cent. interest and two and a half per cent. for advancing it. Thereupon said Wilson proposed to pay this defendant the two and a half per cent., which the defendant would have to pay to his commission merchant for advancing this amount, and persuaded defendant to indulge him till he could make another crop. The same thing was repeated in March, 1873, at the time of the execution of the last mortgage, which defendant holds. So that said Wilson agreed to pay defendant two and a half per cent. commissions from February 12, 1872, to October, 1873.

This defendant also “averred, that it is not true, as alleged in said bill, that the note and mortgage which were executed on the sixth of March, 1873, by the complainant and her husband, was made on no new consideration. As heretofore alleged, one John H. George, who was solvent and responsible, became surety of said Wilson, and without such security, defendant would not have sold to said Wilson as he did. In the early part of 1872, said George became uneasy about Wilson failing to pay this defendant, and insisted on Wilson executing a mortgage to this defendant on said land to secure the balance of the purchase-money, so that in the event he paid the amount due on the note, he would have a speedy remedy by being subrogated to defendant’s right under said mortgage. Wilson agreed to execute the mortgage, which was executed in February, 1872, and was received by this defendant. Afterwards, in March, 1873, said George became still more uneasy about Wilson’s default of payment, and asked defendant to release him from his said obligation as surety; and on the earnest solicitation of said George, complainant, and Wilson, the defendant consented to release him, and to extend the time of payment until October 1, 1873, on the express condition that said Wilson should execute a new mortgage on all of said land, and a new note for the balance due therefor, and that complainant should join her husband in executing said note and mortgage. Thereupon said note and mortgage dated March 6, 1873, were

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executed and delivered to this defendant, and he at the same time surrendered the note upon which said George was surety, and cancelled the mortgage made in February, 1872. This was done at the earnest request, and for the accommodation of the complainant and said Wilson and said George. And defendant alleged he is an innocent purchaser of all the land described in said mortgage, and he had no notice of any claim of the complainant, if any she have."

The defendant also denied the right of the complainant to "invoke the benefit of the statute against usury for herself and husband in this case, even if the contract were usurious, which he denies."

Upon the final hearing, the court decreed that the complainant was not entitled to relief, and dismissed the bill.

GAMBLE, & BOLLING and DAVID CLOPTON, for appellant.

HERBERT & BUELL, and T. H. WATTS, for appellee.—1. Such a trust as is averred in the bill can not be created, except it results by implication or construction of law, or unless it be shown to be such "as may be transferred or extinguished by operation of law," "unless by instrument in writing, signed by the party creating or declaring the same, or by his agent or attorney lawfully authorized thereto in writing."—Revised Code, § 1590. And no such trust can defeat the title of creditors or purchasers without notice. Code, § 1591.

2. It is not pretended that there is any written instrument declaring a trust in the lands in favor of the complainant. And argument of counsel admits there is no trust by implication or construction of law, and that there is no equitable title in the lands. But it is contended there is an equitable lien thereon in favor of the wife (complainant), because a part of her statutory separate estate is invested in a part of the lands and in improvements thereon. No trust by implication or construction of law can arise, unless the money of the wife was paid at the time of the purchase, or constituted the moving cause of the title.—Perry on Trusts, p. 105, § 133; 1 Lead. Cases Eq. pp. 275, 278; *Botsford v. Burr*, 2 Johns. Ch. Rep. 405; 3 Ala. 302; *Carleton v. Rivers*, in manuscript.

3. There can be no equitable lien in the nature of a trust when the wife's money is mingled with the husband's and used in the purchase.—30 Ala. 164; 40 Ala. 518; 8 Port. 211. The husband's mutual rights are governed by the law

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of the domicil of the husband and wife at the time of the marriage, or at the time the property accrues to the wife. *Doss v. Campbell*, 19 Ala. 590. The woman's law in Alabama does not apply to separate estates created by will or deed, but only to such as do not conflict with terms of the will, deed or contract creating them—29 Ala. 528; 32 Ala. 483; 52 Ala. 456.

4. But it is insisted that Knight, having taken usurious interest, is not a *bona fide* purchaser. Now the complainant has shown no such interest in the land mortgaged as will enable her to insist on usury. To do this, she must have some title of an equitable character in the thing in controversy—or must be a defendant to a suit in which the usurious contract is sought to be enforced.—19 Ala. 753.

5. It is maintained that Knight has never lost his vendor's lien.—48 Ala. 90. The lien follows the consideration, unless an intention is shown to interrupt it.—45 Ala. 666; 2 Story Eq. §§ 1224, 1226.

MANNING, J.—Although there is evidence on the subject, it is so conflicting as not sufficiently to prove that defendant, Knight, was informed until long after the first mortgage to him, that of February, 1872, was executed, that the moneys of complainant which her husband, Sol. D. Wilson, used in paying for the mortgaged lands, were moneys of her separate estate. The lands, themselves, were not bought for, or conveyed to her.

Upon the execution of that mortgage to Knight, he took a new note from Wilson alone, for the balance, payable at a future day, which the latter owed him, for lands, (which was much the larger part of the debt,) money lent, goods sold and usurious interest, and surrendered Wilson's note for \$2,500, for the lands, to which note one George, a solvent and responsible person, was a party as Wilson's surety. This note had been somewhat reduced by partial payments. We must, therefore, hold that Knight was a *bona fide* mortgagee of the lands without notice of any interest Mrs. Wilson might claim therein. All of her money which had been used in paying for them, had been paid before.

The note secured by this first mortgage, was for \$2,324; and the balance of this sum reduced by partial payments, with the addition of some more usurious interest, constituted the consideration of the note for \$1,947 27-100, and mortgage of the same lands, to secure it, which were executed by both Wilson and complainant, his wife, in March, 1873.

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The fact that Wilson and his wife both signed this note and mortgage, (although her signature to the note did not bind her to anything,) is relied upon as evidence in addition to that which we have regarded as previously insufficient,—of Knight's knowledge that Mrs. Wilson's money had been used in paying for the lands, or that she had some interest in them. Whether this inference is correct or not, we need not inquire. By virtue of the mortgage of 1872, Knight, as we have seen, had acquired a lien superior to her interest or equity. And this lien must be considered as continued by the second mortgage and note, and not as extinguished by them. The object of making these was, to provide for a prolongation of the time, and the making of another crop, for the payment of the debt.

It follows that the right asserted by complainant can not be maintained, unless Knight's title is invalidated or impaired by the usury in the transactions.

It is clear beyond any doubt, that a large part of the land and all of the improvements on it were paid for with money of Mrs. Wilson's separate estate by her husband who was trustee of the same. This gave her a right higher than that of a mere creditor. Against her husband and any one who was not a *bona fide* purchaser from him, she was entitled to follow the trust moneys into the land, and to have it charged with a lien for their repayment. To what extent was Knight a *bona fide* purchaser or mortgagee? Ought equity to protect him as such, in regard to that part of his claim which arose out of a violation of law?

Our statutes do not as formerly they did, as well as those of other States, denounce as wholly void, an usurious contract for the loan of money, or for the forbearance to collect money due. They make it void only for all over and above the principal sum. That is a *bona fide* credit, and may be sued for and recovered according to law. And it seems to me that according to the principles of equity-law—and in a court of chancery, Knight should not be allowed to recover out of the land in controversy against the older equity of Mrs. Wilson, a *cestui que trust*, whose money had been put by her trustee into this land,—any more than the principal of his debt amounted to when usury began to be stipulated for and charged.—See *Wells v. Morrow*, 38 Ala. pp. 129-30; *Perry on Trusts*, §§ 836, 842.

But the courts generally, and this court especially, have so constantly held that the defence of usury was a personal privilege, and could not be set up by any person but the

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debtor, or his personal representative, or his sureties,—that it is thought Mrs. Wilson cannot be allowed to make that objection. I, therefore, yield reluctantly, and without elaboration, a view that I consider more in accordance with the principles by which courts of equity are usually guided.

Let the decree of the chancellor be affirmed.

STONE, J., not sitting.

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Suit on a Promissory Note.

1. *Usury is no defence to an action, on renewed notes held by an innocent holder.*—The plea of usury is no defence to a suit on a promissory note, when the maker renewed it in the hands of a subsequent holder, who gave full value for the note, and had no knowledge of the usury.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The plaintiff, Buckner H. Mitchell, brought suit to the October term of the City Court of Montgomery, against Thomas J. McCullough, to recover the money due on a promissory note made by him. The defendant filed the following pleas, viz :

1. “Comes the defendant, and for answer to the complaint, says he did not undertake or promise in manner and form as alleged in the complaint, and this he is ready to verify, &c.

2. “The defendant for further answer to the complaint says that the note upon which this action is founded is usurious and void ; and this he is ready to verify, &c.

3. “The defendant for further answer to the complaint, says that the defendant borrowed heretofore, to-wit, in 1858, from L. Townsend, as guardian of the person and estate of — Killen, the sum of twelve hundred dollars, for the loan and use of which the defendant agreed to pay interest at the rate of twelve and a half per cent. per annum, and upon the said indebtedness the defendant has paid a large sum, to-wit, the sum of twenty-three hundred dollars. Defendant further says, that the note upon which the action is founded was given by this defendant in renewal and extension of an

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unpaid portion of said indebtedness, and the said note is wholly usurious and void. The defendant further says, that the said — Killen is now the wife of the plaintiff, and this he is ready to verify, &c.

4. "The defendant for further answer to the complaint, says that the note upon which the action is founded was given by this defendant in renewal and extension of the unpaid balance of a note which was the statutory, separate estate of — Mitchell, who is the wife of the plaintiff, created and secured to her by the laws of Alabama; and that the plaintiff is not the party really interested in said note; and this he is ready to verify, &c."

The judgment entry recites that the plaintiff demurred to the second, third, and fourth of the said pleas, and the court overruled the demurrer to the second and third pleas, and sustained it as to the fourth plea.

On the trial the plaintiff "read, in evidence, the promissory note described in the complaint, to the jury, and rested." The bill of exceptions states, "the defendant was then sworn as a witness in his own behalf, and testified that in 1858, he purchased from one Townsend a tract or parcel of land for \$1,600, and when the purchase-money became due in 1858 or 1859, he was ready to pay it, but that Townsend said to him when he was about to pay the money, that he, Townsend, was guardian of — Killen, a minor, and had money belonging to her, which he wished to loan out, and requested defendant to pay only \$600 of the amount due, and to give his note for the remaining \$1,000, with interest at twelve per cent. per annum. Defendant assented to the proposition and paid Townsend the \$600 in cash, and gave his note to Townsend for \$1,120, payable twelve months after date, being for the \$1,000, with interest at the rate of twelve per cent. added to the amount; that he gave no securities on the note, and that he did not recollect whether the note was made payable to Townsend as guardian, or individually; that at, or soon after, the maturity of the note, he paid Townsend \$500 on the debt, and gave to Townsend a new note for the balance due, calculating interest on the \$1,120 from the maturity of the original note, which was taken up and destroyed.

"Townsend died in 1862; and after the war, in 1865, defendant found said note in the possession of said — Killen, then twenty-one years old, who claimed the note as her own. Defendant paid to her \$100 on it. Afterwards she married plaintiff, Mitchell, who applied to the defendant for

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payment of the note. Defendant thereupon paid plaintiff in part, took up the old, and gave a new note, payable to the plaintiff for the residue; and after making one more payment on the note thus given, that note was taken up, and the note in suit was given for the balance, after deducting the said payments.

“In the first settlement with the plaintiff, when the note to Townsend was taken up, and also in the second settlement with plaintiff when the first note given to him was taken up, and the note now in suit was given for the balance, interest was calculated at eight per cent. on the amount due, and nothing was said about usury in the original transaction; and defendant never said anything to plaintiff or plaintiff's wife about usury in the original transaction with Townsend until after the maturity of the note now in suit.

“The several payments made by defendant to plaintiff on the debt as above stated, amounted to \$750 or more, amounting together with the payment to Townsend to more than \$1,000.”

This testimony was corroborated by other witnesses. The evidence showed that the note made to Townsend by defendant, was delivered by the administratrix of Townsend's estate to — Killen, upon a settlement with her of the amount due her from the estate of Townsend, who had been her guardian. The evidence also showed that neither — Killen nor her husband (the plaintiff) knew anything of usury, or participated in any manner in the “original usurious transaction.” The first time the plaintiff heard of the usurious transaction was after the maturity of the note in suit. The foregoing was all the evidence in the case.

“Thereupon the plaintiff asked the court to charge the jury that, if they believed the evidence, they must find for the plaintiff. This charge, which was duly asked in writing, was refused, and the plaintiff excepted. The court, at the request of the defendant, charged the jury that if they believed, from the evidence, that the original transaction was a loan of \$1,000, or the extension of a debt by Townsend to the defendant for twelve months, and that interest at the rate of twelve per cent. per annum was added to the face of the note, the note was usurious and void as to the interest, and defendant was only liable to pay the principal sum of \$1,000, so loaned or extended on the original note or any renewal of it, and if they believed, from the evidence, that the payments made by defendant to Townsend, to plaintiff's wife, and to plaintiff himself on this indebtedness amounted

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to more than \$1,000, and that the note in suit was given in renewal of the original indebtedness, including the usury, they must find for the defendant."

To this charge the plaintiff excepted.

D. S. TROY, for appellant.—1. There is but one question presented by this case, and the following authorities are directly in point.—9 Ala. 699; 8 Ala. 53; 3 Ala. 158; Tyler on Usury, 401-406; Ib. 233-234; 1 Duvall (Ky. Rep.) 54; 1 Barbour Chan. 43-44; 15 Iowa, 326; 6 Bos. (N. Y.) 66.

CLOPTON, HERBERT & CHAMBERS, for appellee.

STONE, J.—The rulings of the City Court in this case are directly opposed to the uniform decisions of this court on this question. By the renewal of the note to the subsequent holder, who did not participate in the usurious transaction, gave full value for the claim, and had no knowledge of the usury, the defendant precluded himself from relying on that defence. See the authorities on the brief of appellant. The charge asked by plaintiff and refused, should have been given. There was no material conflict in the evidence, and it clearly showed plaintiff's right to recover.

Reversed and remanded.

Rhea v. The Holston Salt and Plaster Company.

1. *A jury must ascertain the amount due on an account.*—A judgment taken by default on an account, without the intervention of a jury to ascertain the amount of damages, will be reversed.

APPEAL from the Circuit Court of Etowah.

Tried before the Hon. W. L. WHITLOCK.

The facts are contained in the opinion.

W. B. MARTIN, for appellant.

PER CURIAM.—This suit being on an account and not on an instrument of writing ascertaining the plaintiff's demand (Code of 1876, § 3032); and the judgment being by default, without the intervention of a jury, the judgment is reversed and the cause remanded.—*Porter v. Benbow*, 38 Ala. 343.

[Dacus v. Streety.]

Dacus et al. v. Streety.

The Power of a Married Woman to Contract.

1. *The power of married women to contract has not been increased.*—The statutes creating the separate estates of married women have not enlarged their capacity to make contracts. A promissory note given by a wife for the debt of her husband, is not merely voidable, it is absolutely void.

2. *A mortgage on land transferred by delivery only, does not at law transfer the mortgage debt.*—A mortgage on land transferred by delivery, merely creates an equity, but does not at law transfer either the mortgage debt or any right to, or in the mortgaged property.

3. *To authorize the interference of a court of equity, the transfer must have been made for a valuable consideration.*—A court of equity may give effect to it according to the intention of the parties. But to authorize the action of a court of equity, the transfer must be supported by a valuable consideration.

4. *Partial payments made by the wife, can not be reclaimed.*—Partial payments made by the wife on her note with money belonging to her equitable separate estate, or derived as income from her statutory estate, can not be reclaimed by her.

5. *The order in which mortgaged lands must be sold.*—In decreeing a foreclosure of mortgaged lands, some of which have been sold by the mortgagor since the execution of the mortgage, the court must direct the unsold portion to be first sold, and the residue, in the inverse order of their alienation.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. HURIOSCO AUSTILL.

This bill of complaint was filed by John P. Streety as the surviving partner of the firm of Streety & Rinaldi, in the Chancery Court of Lowndes county, against Mrs. Susan E. Dacus and others, to foreclose a mortgage upon the land therein described.

The record shows that Rufus W. Dacus, since deceased, in 1859 was indebted to the firm of Streety & Rinaldi in the sum of six hundred and nineteen 25-100 dollars; and to secure the payment of this amount, he made and gave a promissory note to his creditors, payable on the first day of October, 1869. Dacus also executed a mortgage upon land described in the instrument, "for the purpose of securing the payment of the said promissory note."

The bill of complaint also alleges "that a part of the said debt was paid as follows: On the first day of November, A. D. 1860, Mrs. Susan E. Dacus, the then wife of R. W. Dacus, executed as collateral security for the payment of said debt, her two promissory notes; one for three hundred and twenty-

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six 45-100 dollars, and the other for three hundred and thirty 46-100 dollars, payable twelve months after date thereof to said Streety & Rinaldi, with interest from date thereof; that upon these collateral notes the following payments were made, to-wit: On the seventh day of June, 1863, one hundred dollars; on the 13th day of February, 1864, one hundred dollars; (these payments were in Confederate money); on the second day of February, 1876, two hundred and twenty-five dollars. These payments were indorsed upon the two notes above described, and constituted all the payments and credits ever made upon the said debt as secured by said mortgage."

The complainant further averred, that "sometime in the year 1871, the agreement or arrangement by which Mrs. Dacus had given her two notes as collateral, as aforesaid, was changed in this particular: "The complainant agreed to abate all the interest which may have accrued on her said notes up to November 5, 1865, provided the amount of said debt due by her should be promptly paid on the first day of January, 1872; and for the purpose of securing the performance of this agreement and to secure the payment of the notes due from the said Mrs. Dacus to complainant, she, the said Susan E. Dacus, re-transferred and delivered the said mortgage to complainant as his property, and the same is now his property." The complainant further alleged the money, except as above stated, had never been paid by Mrs. Dacus.

The defendant, Mrs. Susan E. Dacus, filed an answer and cross-bill, she denied that the notes were given as collateral security for the payment of her husband's debt; and alleged that the notes were given in purchase of the mortgage executed by her husband, the said R. W. Dacus, to the said Streety & Rinaldi, and that upon the execution by her of the said notes, the mortgage was delivered to her. The payments made upon the notes, as stated by the complainant, were made from money belonging to her separate estate; and that the payments nearly "extinguished the whole amount of her promissory notes, but they were not payments of the debt of her husband." She alleged that in 1871 she proposed to the complainant to "rescind the trade which she had made with the said firm for the purchase of said mortgage, and with a view to such rescission, this defendant sent to the said Streety said mortgage which she then held under said purchase, with a request that if such proposition for rescission was accepted, her said promissory notes should be delivered up to her; that said mortgage was so sent to him,

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the said Streety, and was taken by him, but that he failed to return to her her said notes, and has never yet returned the same to her; that he failed to comply with her said proposition for rescission, and that he still holds her said notes, as far as this defendant knows; and this defendant says she is now unwilling to rescind said contract after so great delay and lapse of time on the part of complainant to accept and carry out her said proposition of rescission; and defendant avers that said contract by her with said Streety & Rinaldi, for the purchase of said mortgage as aforesaid, is thus still in force and has never been rescinded, and that said mortgage is her property, and not that of said complainant, and as such should be delivered up to this defendant, and she now demands that the same be done. And this defendant says that if complainant persists in holding and claiming said mortgage, and is allowed by the court to do so, and to rescind her said contract of purchase thereof, or to alter or disregard the same, said complainant should in equity and good conscience, pay back to her the money paid by her on her said contract, with interest on the same from the time of such payments, and the defendant will and does in such case demand the same to be done, and will in such case insist that a lien in her favor for money so paid by her be declared by this court upon said real estate described in said mortgage."

It appeared that the mortgage upon the execution of the promissory notes of Mrs. Dacus had been transferred to her simply by delivery; no assignment of it in writing was ever made to her.

The record showed that the said Rufus W. Dacus and his wife, Susan E. Dacus (the defendant), had conveyed to Jane Stepney, afterwards Jane Lloyd, a part of the land embraced in the mortgage made to Streety & Rinaldi; and also conveyed another part of the same land to Hiram Mushat.

On the final hearing of the cause the court decreed that the complainant was entitled to relief; and ordered that unless the defendant paid the sum of five hundred and thirty-five 80-100 dollars, the amount due the complainant, within sixty days, the said mortgage should be foreclosed.

GIRARD COOK, for appellant.

CLEMENTS & ENOCHS, for appellee.—1. It is evident from the record that the mortgage has never been satisfied. The notes of appellant given to Streety were utterly void, and imposed no liability on her separate estate.—38 Ala. 518;

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43 Ala. 190; 47 Ala. 456; 45 Ala. 337. It is a well established principle that the lien lasts as long as the debt. Nothing but an actual payment of the debt or an express release, will discharge the mortgage.—Hilliard on Mort. pp. 448-9. The Statute of Limitations is not available.—29 Ala. 703; 33 Ala. 18.

2. There is no inconsistency between the original and amended bills.—33 Ala. 168. It is permissible for the complainant, at any time before the hearing, to add new facts, but not by the amendment to make a new case.—33 Ala. 57. And an amendment takes effect as if it were in the original bill.—35 Ala. 334, and authorities *supra*.

BRICKELL, C. J.—The statutes creating the separate estates of married women, have not enlarged their capacity of contracting. The disability, the common law imposes, remains except as to an alienation and conveyance of her statutory estate, made by husband and wife jointly. The contract by which Mrs. Dacus gave her promissory notes for the debt of her husband, whether the notes were given as collateral security, or in purchase of the mortgage, is void, not voidable. There are contracts into which she may enter, that a court of equity will not permit her to repudiate, and yet keep the benefits acquired by them. If she purchases lands, she can not retain them without paying the purchase-money. Or if she gives her own note for the purchase-money, receives a conveyance from the vendor, and in her own name, without the concurrence of her husband, executes a mortgage on the lands for the security of the notes, a court of equity will decree that the mortgage shall stand as a valid security, binding the lands, though imposing on her no personal liability.—*Leach v. Noyes*, 45 N. H. 364; *Hatch v. Morris*, 3 Edw. Ch. 313; *Chilton v. Braichen*, 2 Black, 458; *Marks v. Cowles*, 53 Ala. 499. The only transfer of the mortgage to Mrs. Dacus was by delivery merely. Such a transfer under any circumstances could create only an equity. It does not in a court of law pass the mortgage debt, or any right in or to the mortgaged premises. A court of equity may give effect to it, according to the intention of the parties. It must however, to invoke the interference of that court be supported by a valuable consideration. In the absence of such a consideration, parties are left to stand on their legal rights and remedies. If Mrs. Dacus had paid the notes, she could doubtless have compelled a transfer to her of the mortgage debt, and of the mortgage. Such pay-

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ment alone, would give her an equity which can be enforced. The contract with her being without legal validity, the mortgage remains an operative and valid security for the mortgage debt, and the debt being unpaid in part, the mortgagees are entitled to a foreclosure.

The claim set up by the cross-bill for a reclamation of the payments made by Mrs. Dacus on her notes, can not be supported. A party seeking relief whether by original or cross-bill, must show his right by clear and distinct averments. The cross-bill, and the proof in support of it, are alike silent, as to the kind of separate estate, of which Mrs. Dacus was possessed—whether it was a statutory, or an equitable estate, and also silent as to whether the payments, were of moneys derived from the corpus, or the income. If her estate was equitable, in the absence of restraining limitations imposed by the instrument creating it, her capacity to make the payments, would be that of a *feme sole*, and she would be without equity to reclaim them. All that she could claim, would be an enforcement of the equity to a transfer of the mortgage, and the mortgage debt, on making payment of her notes. On the other hand, if the estate was statutory, and the moneys were derived from the income, and not the corpus, she would be without right to reclaim them. We abstain from expressing any opinion on the right of reclamation, if the moneys were derived from the corpus of the statutory estate of the wife. The cross-bill, nor the proof present that question. *Reel v. Overall*, 39 Ala. 138.

The chancellor erred in decreeing a sale of the entire mortgaged premises, without distinguishing between the parts sold by the mortgagor, and the part remaining unsold. The principle which has been adopted in this State, is, that if mortgaged lands are sold in several parcels, at different times, to different purchasers, by the mortgagor, on decreeing a foreclosure, a sale must be ordered first of the lands undisposed of by the mortgagor, and then the parcels sold, in the inverse order of their alienation.—*Mobile M. & D. Ins. Co. v. Huber*, 35 Ala. 713. The decree must therefore be corrected, and a sale ordered first of the part of the premises, not sold by the mortgagor, and if the proceeds of such sale shall not be sufficient for the payment of the mortgage debt, and interest, and the costs of suit, then the parcel of land conveyed to Hiram Mushat, must be sold for the payment of the balance remaining unpaid; and if the proceeds of such sale, will not pay such balance, then the parcel of land conveyed to Jane Lloyd, must be sold. The decree being thus corrected, will be affirmed, at the costs of the appellee.

[Barnes v. Carson.]

Barnes et al. v. Carson.*Dower.*

1. *A reference to the register for the purpose of ascertaining the value of the statutory estate of a married woman is proper.*—When it is decreed that complainant is entitled to dower in certain lands, unless she has a statutory separate estate equal in value to her dower interest, a reference to the register to ascertain and report the extent of her statutory estate and the value of her dower interest, is a convenient method of ascertaining facts; and is not objectionable on the ground that it refers for determination of the master, matters on which the equities of the bill rest.

2. *Evidence not offered on the reference can not be considered.*—If, in such a case, after due notice, the register reports there was no evidence that complainant had a statutory estate, and the report is confirmed, depositions, showing that complainant was in possession of other realty, but not showing the nature of her estate therein, and not offered as evidence on the reference, can not be considered for the purpose of reversing the decree.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. HURIOSCO AUSTILL.

On the 26th day of May, 1874, Kate M. Carson, the widow of Thomas A. Carson, filed a bill of complaint in the Chancery Court of Lowndes county, against Lloyd Barnes, James H. Hickson, George W. Bender, Moritz Meyer and Adolph Elkan. The complainant prayed that dower, in the lands described in the bill, “be allotted to her by metes and bounds; and that one-third in quantity and value of said lands be allotted to her; and that an account be taken of the rents and profits, and one-third thereof be decreed to her, with interest thereon.” In the answer of Lloyd Barnes, who purchased all of said lands at the administrator’s sale, and went into possession of them early in the year 1869, it was averred “that on or about the 16th of December, 1867, the complainant filed her petition in the Probate Court of Lowndes county, asking for a homestead to be allotted to her out of the said lands. And on or about the said last named day, an order was made by said Probate Court, allowing her the homestead claimed, and appointed commissioners to set apart said homestead if it could be done without injury to said estate of Carson; and said commissioners reported that it was best to allow five hundred dollars in lieu of land by metes and bounds. And the said sum of five hundred dollars was allowed and paid to the complainant out of the pro-

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ceeds of the sale of said lands by the administrator of the estate of said Carson. Defendant further answers and avers, that in said petition, so filed by said complainant, for the allowance of said homestead, she not only did not claim any dower in the said Carson estate, but showed she was not entitled to any dower in said Carson's estate, by reason of the fact, she held a large estate consisting of both real and personal property, which she had devised from her former husband, Thomas B. Burton's estate, and said real and personal estate was her separate statutory estate; and this defendant avers the fact to be, that at the time of the death of said Thomas A. Carson the said complainant had and owned property, real and personal, her separate, to the value of at least ten thousand dollars, and certainly of much more value than the value of any dower interest she would otherwise have been entitled to in the estate of the said Thomas A. Carson."

At the April term, 1877, of the Chancery Court, the cause was heard upon the pleadings and testimony.

The court was of the opinion that the complainant is entitled to dower, unless she had at the time, the sale to Barnes was confirmed by the Probate Court, or has such estate now equal in value, or exceeding in value, the value of her dower interest.

The court also "ordered and decreed that the matter be referred to the register to take testimony and report to the court, at the next term, what the value of complainant's dower interest in the lands described would be, estimated at seven years' rent of such dower interest. He will further report whether complainant had a statutory separate estate at the time the sale to Barnes was confirmed by the Probate Court, and if so, the value of such separate estate.

"He will further report whether complainant has now a statutory separate, and if so, the value thereof.

"If the register finds she had a separate estate at the first date above mentioned, and none now, he will ascertain, and report, whether such estate has been lost by negligence or fault on her part."

In accordance with the foregoing decree, the register held the reference, took testimony, and ascertained the value of the dower interest of the complainant, and reported "that there was no testimony offered as to the statutory separate estate of the complainant."

At the October term, 1877, of the Chancery Court, the cause was submitted on the pleadings and testimony, and

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upon the report of the register, and the court rendered a decree, of which this is an extract :

“ Upon consideration of all the facts, it is ordered, adjudged and decreed, that complainant, in the original bill, is entitled, and that she be allowed dower in said lands so purchased by Barnes, at said administrator’s sale, to the extent of one-third in quantity and value of the whole of said land so purchased by said Barnes, having regard to the improvements and quality of the land as well as the quantity of dower. It appears, from the report of the register, that the value of the dower interest of complainant, that is, one-third interest in the value of the whole rent from January 1, 1869, to January 1, 1876—seven years—amounts to five hundred and thirty-one 48-100 dollars.”

WATTS & SONS, and GEO. M. MARKS, for appellant.

DAVID CLOPTON, and R. M. WILLIAMSON, for appellee.

MANNING, J.—At the hearing, the chancellor held that complainant was entitled to dower in the land described in the bill, unless she had a statutory separate estate equal in value to her dower interest ; and that there should be a reference to the register as master, to inquire into and report at the next term of the court, upon the matter of complainant’s separate estate, and the value of such dower. A decree was made accordingly ; and upon the coming in of the master’s report, a decree was passed at a subsequent term, granting the dower prayed for.

The only objections assigned to the decree of reference, are, that it declares Mrs. Carson entitled to dower ; that it refers it to the master to ascertain whether she had a statutory separate estate ; and that it referred to him matter on which the equity of the bill rested. No other point is brought out by the assignment of errors to this decretal order, or the argument upon it.

The facts, that complainant was the widow of Thomas A. Carson, and that he died seised of the land described in the bill, and that it was purchased by defendant Barnes, at the sale thereof, made by the administrator of Carson’s estate,—are not disputed. From these it followed that she was entitled to dower in the land, unless she had such an amount of statutory separate estate, as under the law, would deprive her of it.

Whether she did have such separate estate, and the value

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thereof, were certainly things proper to be ascertained by a reference to a master. They were not abstract questions of law, but matters of fact. The parties could, upon such inquiry, produce the evidence, documentary or otherwise, on which they respectively relied. The conclusions, though of the master, if not satisfactory to one side or the other, were of course, not binding, until confirmed by the chancellor. But a reference was a proper way of getting at the facts and, if parties required it, of having the evidence of them reported for the consideration of the chancellor, upon exceptions to the report.

The second objection to the decree of reference was, therefore, not well taken.

And what we have said in respect to it, shows that the third objection is also without foundation. The decision of the law of the case was not thereby transferred to the register.

The report of the register as master, showed that he appointed a time for the investigation, gave notice thereof to the parties, and was attended by the solicitor for complainant. After hearing some evidence of the value of the use of the property, or rent thereof, he adjourned investigation to another day, of which also he gave notice. And in respect to the alleged statutory separate estate in complainant, he reported that no evidence thereof was offered.

No exception was filed or made to the report; nor was any re-reference asked. The report consequently was confirmed; and upon the ground that no separate estate to bar complainant of her claim, was shown, a decree was rendered granting dower as prayed.

It is urged that the evidence in some of the depositions shows that she was in possession of property in Montgomery and said it was her separate estate. This is true; and it justified the reference; at which this evidence might have been introduced, and if introduced might have been controverted by the production of the title-deeds and other evidence, showing that the property belonged to some one else. We cannot know what the result of such a contention would have been, and that it was not declined because defendants had ascertained that complainant did not own the property.

Let the decree of the chancellor be affirmed.

STONE, J., not sitting.

[Ex parte Alabama Gold Life Insurance Co.]

Ex parte Alabama Gold Life Insurance Company.

Mandamus.

1. *An election will not be compelled, except when the suits seek the same relief.*—To require an election between a suit at common law and a suit in chancery, the suits must not only have the same aim and scope, but they must relate to the same subject-matter, and seek substantially the same relief.

BEFORE the Supreme Court.

The petition of the Alabama Gold Life Insurance Company, praying for a writ of *mandamus*, directed to the Hon. Huriosco Austill, Chancellor of the Southern Chancery Division, contains the following facts:

On the eighth day of March, A. D. 1878, the petitioner and Isaac Friedman & Co., as creditors of David Bear, filed a bill of complaint in the Chancery Court of Butler county against Adolph Greenhut as assignee of David Bear, and also against David Bear. The bill alleged that the assignee was guilty of fraudulent conduct, and prayed that he might be removed from the trust, and the property conveyed by the deed of assignment might be delivered to a receiver. The respondents demurred to the bill of complaint, but the demurrer was overruled.

On the 18th day of April, 1878, the defendant, David Bear, filed in said Chancery Court his motion in writing, alleging that the petitioner since the filing of the said bill had brought suit in the Circuit Court of Butler county on the same claim mentioned in the bill of complaint, and prayed an order of said Chancery Court requiring petitioner to elect in which court it would proceed against him, and to dismiss the other.

“On the 19th day of April, 1878, the court, against the objection of the petitioner, made an order continuing said motion of the defendant, Bear, until the defendants had answered the bill and time for filing exceptions thereto had expired, and the court, *ex mero motu*, further ordered that petitioner be restrained from proceeding further in its suit at law against said Bear until the motion to compel an elec-

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tion should be disposed of, unless the petitioner should in meantime dismiss its bill."

Upon the next day the petitioner "filed in said court its written motion praying the court to set aside and vacate the said order made on April 19th, restraining petitioner from proceeding at law against said Bear, and on the same day the said motion was heard and denied by the court."

And the petitioner "therefore prays that such writ issue to the Hon. Huiosco Austill, Chancellor of the Southern Chancery Division of the State of Alabama, commanding him to set aside, vacate and annul his said order of April 19th, 1878, restraining petitioner from proceeding in its said suit against said Bear in said Circuit Court," &c.

No answer to the application for the writ of *mandamus* was filed.

HERBERT, BUELL & LANE, for petitioner. — 1. Bear having wrongfully obtained possession of a portion of the trust property by collusion with the assignee, the court is asked to compel him to surrender it. No decree is asked against him for the amount of the note. Has Bear wrongfully possessed himself of the trust property, and if so ought the court to compel him to surrender it? This is the only issue as to Bear. But the issue in the Circuit Court is simply, does he owe the plaintiff the money expressed in the note sued on? The one is a suit in *assumpsit* on a promissory note; the other is a suit to recover possession of property wrongfully withheld from the equitable owners thereof. The suits, therefore, are not instituted for the same claim. Unless this is so, the complainant will not be required to elect.— *Way v. Bagraw*, 1 C. E. Green. (N. J.) Eq. Reps. 213 and cases cited; 52 Ala. 178; *Ib.* 578; 7 Ala. 943; 14 Ala. 597; 2 Daniel Ch. Pract. 962; 2 Brick. Dig. p. 253, § 76.

STONE, J.—It is only when a bill in chancery and a suit at law are prosecuted for the same claim, that the plaintiff or claimant can be compelled to elect in which court he will proceed.—Rule of Chancery Practice No. 103. To come within the principle, the two suits must have substantially the same aim and scope. It is not enough that the two suits relate to the same subject-matter, unless the relief sought is, in each case, substantially the same. The suit at law, in the present case, has for its object the reduction of the plaintiff's entire claim to a judgment, with a view to its collection by execution. This is prosecuted alone against David Bear,

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the maker of the note. The bill in chancery was filed against Bear and another, and seeks to secure and make available certain goods and effects, alleged to have been assigned by Bear to a trustee, for the security of this with other debts. The bill charges a gross breach of trust by the assignee, and his inability to account for the trust funds. The most that can be accomplished under the bill, will be to save the residuum of this trust fund from waste, and to bring the trustee to account. There can be no decree over for any balance against Bear; and there is nothing in the bill to show that there is a sufficiency of the assigned effects that can be made available, to pay the plaintiff's entire claim. See authorities on petitioner's brief.

Let the writ of *mandamus* issue as prayed for. The costs to be paid by David Bear, defendant in the chancery suit, who moved for the order of election in the court below.

Ex parte Proskauer.

Mandamus.

1. *A stranger can not be made a party to a suit without the consent of his adversary.*—A person who is neither plaintiff nor defendant, can not be made a party to a suit at law without his adversary's consent, unless the action be for the recovery, or possession, of lands.

BEFORE the Supreme Court.

A suit was commenced in the Circuit Court of Butler county by Adolph Proskauer to recover damages against T. B. McCall, William Hamilton, William H. Morris and B. L. Long, as sureties on a *supersedeas* bond, executed by J. D. Gafford as principal. The bond was made when an appeal to the Supreme Court was taken by J. D. Gafford and his wife, S. A. Gafford, from a decree rendered by the Chancery Court of Butler county against them in favor of A. Proskauer, under the name of A. Proskauer & Co. The decree was affirmed by the Supreme Court.

Afterwards, Proskauer instituted the suit mentioned, but did not sue J. D. Gafford, who was principal on the bond. The defendants (his sureties) notified him of the pendency of the suit against them; and upon a motion made by them and J. D. Gafford, he was made a party defendant to the

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suit. The plaintiff objected to the motion ; and to the action of the court he excepted. Subsequently, the plaintiff moved the court to vacate and set aside the order by which Gafford was made a party defendant to the suit. The court refused the motion, and the plaintiff excepted.

Upon the foregoing facts Proskauer filed a petition, praying that the judges of the Supreme Court "would issue a writ of *mandamus*, or some other appropriate writ, directed to the Hon. John K. Henry, judge of the eleventh judicial circuit of the State of Alabama, commanding him to annul, vacate and set aside said order or judgment," &c.

D. S. TROY and L. M. LANE, for petitioner.

WATTS & SONS, *contra*.

PER CURIAM.—There is no statute or rule of law known to us, which authorizes an outsider, not suing or being sued, to have himself made a party to a suit at law without the adversary party's consent, save in an ejectment or other suit for the possession of land.

Let the writ of *mandamus* issue as prayed for, commanding the Circuit Court of Butler county to vacate the order complained of. The costs to be taxed against J. D. Gafford.

Shaver, as County Superintendent, &c. v. Robinson, as Tax-Collector of Montgomery County.

1. *The poll-tax must bear the expense of its assessment and collection.* Although the constitution requires that the money derived from the poll-tax shall be applied exclusively "in aid of the public school fund," it must bear the expense of its own assessment and collection.

2. *The Auditor can determine the amount of commissions due the assessor and tax-collector.*—The money raised by the poll-tax is not paid into the treasury of the State, but the Auditor, in settling with the tax-collector is clothed with authority to decide the amount of commissions due to the assessor and collector from the "poll-taxes in that settlement." Beyond this, his authority does not extend.

3. *The Auditor can not direct the commissions earned in one year to be paid from the taxes of another.*—The Auditor has no power to direct a tax-collector to retain from the poll-tax collected during the current year, the commissions earned by collecting this fund in preceding years.

[Shaver v. Robinson.]

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

This is a motion made by L. A. Shaver, as county superintendent of education of Montgomery, in the City Court of Montgomery, against Patrick Robinson, as tax-collector of Montgomery county, to recover a summary judgment for seven hundred and eighty-nine dollars, the amount of poll-tax collected by him from the tax-payers of the said county, in the month of October, 1877. The defendant interposed a demurrer, which was overruled by the court. The defendant then pleaded the general issue and payment.

On the trial it was proven that the defendant had been tax-collector of Montgomery since 1870. And in 1875 he had paid to the plaintiff all the poll-tax collected by him, without deducting therefrom the commissions of the assessor and collector; but the Auditor had allowed the commissions due on the poll-tax collected, out of other money. But, after the payment of all the poll-tax collected in 1876 to the plaintiff, the Auditor refused, in his settlement with the defendant for that year, to allow him the sum of three hundred and fifty-five 79-100 dollars, as commissions due the assessor and collector on the poll-tax. It was also shown, that the Auditor revised the settlement made by the defendant as said tax-collector with the Auditor, for the year 1875, which had been closed by the predecessor of the Auditor, and charged the defendant with the sum of one hundred and eighty-eight 81-100 dollars, which had been allowed him on the said former settlement. The Auditor instructed the defendant to retain the sum of one hundred and eighty-eight 81-100 dollars as commissions, formerly allowed for the assessment and collection of the poll-tax of 1875, and also three hundred and fifty-five 19-100 dollars, as commissions on the poll-tax of 1876, out of the poll-tax collected in the year 1877.

The evidence showed that the defendant, in the month of October, 1877, collected poll-tax to the amount of seven hundred and eighty-nine dollars, and pursuant to the instructions of the Auditor, he retained from this sum the commissions of the assessor and collector, earned by services relative to the poll-tax in the years 1875 and 1876, besides sixty-three 12-100 dollars, the commissions due these officers from the poll-tax collected in 1877. He paid the remainder, one hundred and eighty-one 28-100 dollars to the plaintiff.

The evidence also showed, that from 1870 until 1876 the expenses of assessing and collecting the poll-tax of Montgomery county had never been borne by the money derived

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from the poll-tax, and the defendant had never been informed of this change of the construction of the law until his settlement with the Auditor in 1876.

The court rendered judgment, requiring the commissions of the assessor and collector, earned by the assessment and collection of the poll-tax in 1876 and 1877, to be paid out of the poll-tax collected in 1877; and refused to render a judgment against the defendant for the sum of three hundred and fifty-five 19-100 dollars, and for sixty-three 12-100 dollars, the amount of commissions due on the poll-tax for the years 1876 and 1877 respectively. To this action of the court the plaintiff excepted.

And the court denied that the Auditor had authority to set aside and vacate an allowance or credit permitted in a settlement of the account of the defendant as tax-collector with the predecessor in office of the present Auditor, and rendered a judgment against the defendant for "the sum of one hundred and eighty-eight 81-100 dollars, with the further sum of thirty-seven 76-100 dollars, being twenty per cent. damages, together with the sum of five 60-100 dollars interest on the said sum of one hundred and eighty-eight 81-100 dollars from the first day of November, 1877." And to this judgment the defendant excepted.

D. S. TROY, and L. A. SHAVER, for appellant.—1. The law requires the tax-collector to pay over to the county superintendent of education of this county *all the poll-tax collected*; the collector has no authority to retain any portion whatever for assessor's or collector's commissions, or for any other purpose.—Constitution of Ala. § 1, art. 11. This section of the constitution is the strongest possible enunciation of the above proposition; the language used is imperative, plain and unambiguous, and there is no room left for construction. *Bartlett v. Morriss*, 9 Port. 268-9; Sedg. on Stat. and Const. Law, 379; *ib.* 486.

2. Admitting, however, that section 1, article 9, of the constitution, is ambiguous and open to construction, and that we are permitted to gather light as to the *intention* of the convention in adopting it from *extrinsic* sources of information, we find those sources to be in direct confirmation of the position for which we contend. In this connection we note the fact, that section 1, article 9, of the present constitution, is a re-enactment of section 1, article 9, of the constitution of 1868. It is material then to ascertain what had been the *legislative exposition* of the latter prior to the adoption of the

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former. We find this exposition to have been uniformly to the effect, that the poll-tax shall be applied "exclusively in aid of the public school fund."—Acts, 1868, top p. 54; ib. § 4, p. 299; Acts, 1874-5, § 3, p. 5; Code, §§ 1010, 1113, 3397. With these repeated legislative expositions of section 1, article 9, of the constitution of 1868, before them, the convention of 1875 re-enacted that constitutional provision *without modification*.

Legislation subsequent to the present constitution has been almost equally as uniform to the same effect.—Acts, 1875-6, § 1, p. 45; ib. § 7, p. 116; Code, § 1003, subd. 7; Acts, 1876-7, p. 199; Code, §§ 1134, 1136.

It is significant, that the acts of March 6, 1876 (Acts 1875-6, p. 45), and of February 18, 1876, were adopted by a legislature largely composed of members of the constitutional convention of 1875. The three acts relied upon by appellee, to-wit, section 11, of the act of March 19, 1875 (Acts 1874-5, p. 61), the act of March 6, 1876 (Acts 1875-6, p. 59), and of February 8, 1878 (Acts 1876-7, p. 199), in so far as they conflict with our positions, are unconstitutional. Section 11 of the first of these acts is negative in its terms, does not mention the poll-tax, was not brought forward into the Code, and was only intended to preserve the *status in quo* on the subject unaffected by the other provisions of the act.

The proof, moreover, is, that the *invariable custom* had been heretofore to pay over the *entire* poll-tax to the county superintendent, and for the State Auditor to allow the tax-collector, assessor's and collector's commissions on annual settlement with the State. The court will take judicial notice of this custom.

3. Section 1, article 9, of the constitution of 1875, can not be held to be merely directory.—Sedg. Stat. and Const. Law. p. 374; *People v. Schermerhorn*, 19 Barb. 540. This provision of the constitution is a *limitation on legislative power*, and such limitations in a *State constitution* are never held to be directory.—*Collins v. Henderson*, 11 Bush (Ky.) pp. 90, 91, 93. If the legislature may appropriate eight per cent. of the poll-tax otherwise than to school purposes, it may so appropriate fifty per cent. or the whole fund, and thus render the constitutional restriction mere *brutum fulmen*. *Collins v. Henderson, supra*, pp. 96, 91.

4. If we be wrong in the position, that *all* the poll-tax collected should be appropriated in aid of the public school fund, then we say, in the second place, it is clear that all of

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it should be so appropriated except the three per cent. commissions of the assessor. *Section 424 of the Code is an express direction to the Auditor to allow the tax-collector his five per cent. commissions.*

5. Admitting, for argument's sake, that the assessor's three per cent. commissions are a proper charge on the school fund, still the whole poll-tax should be paid over to the county superintendent, and that officer should pay the assessor his commissions. In this way only can section 402 of the Code be made to harmonize with the numerous other sections requiring the collector to pay over *all* the poll-tax collected to the county superintendent. In this view of the matter, the motion for the recovery of *all* the poll-tax retained should have prevailed.

6. The tax-collector has no shadow of right to retain, out of the poll-tax of 1877 commissions of the assessor and collector on poll-tax collected during the years 1875 and 1876.

JOHN W. A. SANFORD, Attorney-General, with whom were BRAGG & THORINGTON, for appellee.—1. Such expressions in the constitution as “only” and “exclusively,” “faithfully applied” and “inviolable,” when used in connection with the school fund and poll-tax mean nothing more than that the money so derived shall be applied to none other than educational purposes; but such terms do not prohibit the legislature from requiring the fund to bear the burden of its assessment and collection. Similar expressions are found in acts which provide the poll-tax shall bear the expenses of its assessment and collection.—Acts 1874-5, p. 61, § 11—p. 19, §§ 37, 38; Acts 1875-6, pp. 58, 59, § 15.

2. The poll-tax is a gratuity from the State to the school fund, and must be taken *cum onere*, as to the expenses of its assessment and collection. The officers who perform these duties are entitled to their compensation from the fund as much as the county superintendent, who is paid one per cent. for its disbursement.—Acts 1876-7, p. 208, § 12.

3. It is expressly provided that the compensation of the assessor shall be paid from the poll-tax, for its assessment. Acts 1874-5, p. 19, §§ 37, 38; Acts 1875-6, pp. 58, 59, §§ 14, 15. The several provisions of law, when construed together, also show that the fees and commissions of the tax-collector for collecting it should be paid out of this fund. Acts 1874-5, p. 24, § 54; *ib.* p. 61, § 11; Acts 1875-6, p. 66, § 19; Acts 1873, p. 8, § 9.

4. No credit can be allowed any public officer for collect-

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ing any of the revenue of the State otherwise than by a settlement with the Auditor.—Revised Code, § 414, par. 6. And although the poll-tax is not paid into the treasury of the State, but is kept in the several counties, no settlement of a tax-collector with the Auditor would be complete which did not embrace it. And the Auditor has authority to allow the officers their compensation for the assessment and collection of the poll-tax out of the money so received.

PER CURIAM.—The constitutions of 1868 and 1875 each ordains “That the General Assembly may levy a poll-tax not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public school fund.” It is contended before us that the word “exclusively” requires that the entire sum of the poll-tax, without abatement or diminution for any purpose, shall become part of the school fund. We think this construction too narrow and strict. The exact meaning of the convention, as we understand it, is that the poll-taxes shall, for all time, constitute a school fund, which shall not and can not be appropriated to any other object. It was not contemplated that it should be relieved of the common burden of all revenue raised under our statutes—the expense of its own assessment and collection. We think the following provisions of our statutes do not violate the clause of the constitution, copied at the opening of this opinion. “Act to revise and amend ‘an act to keep in each county of this State a proportionate share of the public school money,’” approved March 19, 1875—section 11 thereof; Pamph. Acts, 56; section 38 of the Revenue Law of 1875, page 19; section 15, ch. 5, Revenue Law, approved March 6, 1876, pages 58–9; section 9, page 8, of act to keep proportionate part of public school money in each county, approved April 19, 1873; section 42 of the Revenue Law of 1868, page 312; Code of 1876, sections 402, 414, 424. So, we think it was competent for the legislature to charge upon the poll-tax fund the commissions of its assessment and collection.

In the Revenue Law of 1868, section 59, page 316, after declaring the rate of commissions to be paid the tax-collector, graduated by the amount of taxes collected, and directing that the collector “shall be authorized to retain the same rate of commissions out of the county taxes,” the statute further enacts that the collector “shall be allowed by the auditor five per cent. for collecting the poll-tax.” At that time the poll-tax and other school moneys raised by taxation

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were required to be paid into the State treasury, thence to the superintendent of education, and the fund was then distributed and paid by him to the several county superintendents. The law being thus, and the poll-tax passing into the treasury after, and pursuant to a settlement with the Auditor, there was a fitness in confiding to that officer the adjustment of the tax-collector's commissions. Under the statute "To keep in each county of this State a proportionate share of the public school money," approved April 19, 1873—Pamph. Acts, 6—it was ordered "that each tax collector shall, at the end of every month, pay all poll-taxes collected during such month, to his county treasurer, and take his receipt for the same in duplicate, endorsed and approved by the probate judge of his county, and the tax-collector shall immediately forward one of these receipts to the State Superintendent of Public Instruction, and a similar receipt shall be received as cash in the settlement of his accounts with the State Auditor." This section shows that the tax-collector's settlements, even for the poll-taxes collected, were still to be made with the Auditor, although the poll-taxes were not to be paid into the State treasury. The ninth section of this statute enacts "That nothing in this act shall be so construed as to prevent any school money from bearing its proportionate part of the expense of assessing and collecting the same." As the statute then stood, the Auditor was to determine the amount of the tax-collector's commissions for collecting the poll-tax, but it was to be taken out of the poll-tax fund. At the present time, and under the act "To organize and regulate a system of public instruction for the State of Alabama," approved February 8, 1877—Pamph. Acts, 199—it is declared that "the poll-tax collected in each county [is] to be retained therein for the support of public schools thereof." Section three of the same act declares that the county superintendent shall receive and keep the educational fund of his county, including poll-taxes, "exclusively for the use of public schools," giving the tax-collector receipts, &c.—See Code of 1876, §§ 1010, 1013, 1134. And, since December 17th, 1874, the school money of the county is required to be paid to the county superintendent of education.—Code of 1876, § 1112. On such payment, the tax-collector takes from the county superintendent "receipt in duplicate for the amount so paid, which receipt shall specify whether the money thus paid was money collected as poll-tax or otherwise; and one of the receipts shall be received as cash in his settlement with the Auditor."—*Ib.* Through all our chang-

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ing legislation since 1868, the clause has been retained that the tax-collector "shall be allowed by the Auditor five per cent. for collecting the poll-tax, [Code of 1876, § 424], although, since April 19th, 1873, the poll tax money has not gone into the State treasury, nor been paid through the Auditor. Section 402 of the Code of 1876 still retains the clause that "the assessor shall be allowed three per cent. for making list and keeping book of poll-taxes, . . . which shall be paid out of the poll-tax." And, in enumerating the sources of revenue "for the maintenance of a system of public schools throughout the State," section 1006, subdivision 6 of the Code of 1876, copying from the act of February 8, 1877, expresses and includes only "The *net* amount of poll-tax which may be collected in this State." We think it clear that through all our changing legislation, the expense of assessing and collecting the poll-tax, has been made a charge on the fund itself.

Was the Auditor clothed with power to authorize the tax-collector to retain out of the poll-tax fund to be collected for 1877, the commissions due to him and the assessor for assessing and collecting the poll-taxes for 1875 and 1876? No statute has been brought to our attention which confers this power, and we have not been able to find any warrant for such order. True, the Auditor, in settling with the tax-collector, is clothed with authority to decide the amount of commissions due to the assessor and collector in regard to the poll-taxes embraced in that settlement; but his authority does not extend beyond this. His order, if given, was utterly void. Neither can the statute of set-off avail the tax-collector. It does not reach such a case as this.—*Hibbard v. Clark*, 56 N. H. 155; *Finnegan v. City of Fernandina*, 15 Fla. 379; *Cobb v. Corp. Eliz. City*, 75 N. C. 1. Taxes and the support of the common schools are wants vital to the public welfare, which can not be defeated by cross demands, however equitable and meritorious. We admit the hardship in the present case, but the legislature is alone competent to relieve it.

It results from what we have said that the tax-collector is entitled to retain for his own and the assessor's commissions for the year 1877, but not for the previous years.

The judgment of the City Court is reversed, and the cause remanded to be proceeded in according to the terms of this opinion.

Whether the present Auditor rightly reviewed and reversed

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the ruling of his predecessor as to commissions for 1875, is not before us, either as to parties or subject-matter. We will not consider it.

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Action for Damages.

1. *The falsity of the facts stated in the affidavit must be alleged.*—In an action to recover damages for the wrongful suing out of an attachment, the plaintiff must aver the falsity of the particular fact or facts which are stated in the affidavit as the ground of the attachment.

2. *Insolvency alone will not justify a resort to the remedy by attachment.* Indebtedness alone will not justify a resort to the remedy by attachment, not even when coupled with pecuniary embarrassment, or actual insolvency.

3. *Actual fraud, or an intent to hinder and delay creditors, must exist.*—It is actual fraud, an evil intent to hinder and delay creditors, not a mere refusal or failure to pay debts, which will support the accusation that a debtor is fraudulently withholding his property from the payment of his debts. To protect creditors against fraud, is the object of the law which authorizes the issue of an attachment.

4. *Evidence to controvert the debt on which a judgment is founded, is inadmissible.*—Evidence can not be introduced for the purpose of controverting the debt on which a judgment is founded. Such a judgment affirms the existence of the debt, and is conclusive between the parties whenever the fact of indebtedness is again in issue between them, directly or collaterally.

5. *Evidence may be admissible for one purpose and inadmissible for another.* Evidence is often admissible for one purpose, when inadmissible for another and distinct purpose. A party apprehending injury from its admission, can, by requesting proper instructions from the court, confine its operation to its lawful purpose.

6. *In questions of fraud, all evidence that throws light on the transaction, is admissible.*—If the question be one of fraud, whatever fact tends to show the good or bad faith of a party throughout the whole transaction, is properly admissible in evidence. But illegal testimony, whether given by a witness in open court, or in a deposition, may be objected to, and should be excluded at any stage of the proceedings.

7. *In a suit for the "vexatious suing out" of an attachment, it is not necessary to prove personal ill-will.*—In an action for the vexatious suing out of an attachment, it is not necessary to prove personal ill-will, or revenge. A party may, without probable cause, resort to an attachment; and absence of probable cause, coupled with the unlawful act of suing out the writ, is the vexatious, malicious abuse of the process against which the statute intends to guard, and for which the jury are authorized to give vindictive damages.

8. *A charge correct in law, but which tends to mislead the jury, will not cause a reversal.*—A reversal can not be had because of an instruction correct in point of law, merely on account of its tendency to mislead. The evil is capable of correction by an explanatory charge, which should be requested.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The facts appear in the opinion.

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H. A. HERBERT, for appellants.—1. There is no doubt that a judgment necessarily affirming the existence of certain facts is conclusive between the parties. This is true even when the facts are incidentally in question in relation to a different matter.—Freeman on Judg. § 249; 25 Cal. 272; 6 Pet. 729. The record of a former recovery is conclusive. Freeman on Judg. § 257. Decisions on the merits of a cause are final.—Freeman on Judg. § 260; 12 Mo. 103; 35 Tex. 594. In a suit between the same parties, judgment offered in evidence is conclusive as to the facts or rights therein determined.—Freeman on Judg. § 280; 1 Greenl. Ev. § 531; 49 Ala. 236; 14 Ala. 581; 23 Ala. 851.

2. The issue in the case below was whether there was sufficient cause for suing out the attachment. Yet the plaintiff proceeded on the idea that he had probable cause for refusing to pay. But “neither indebtedness, pecuniary embarrassment, nor insolvency, is a ground for an obtainment of the attachment.”—38 Ala. 636.

3. Under a general allegation of injury to credit, it is not permissible to prove the loss of a *particular customer*.—13 Ala. 500, 512; 42 Ala. 142; 33 Ala. 172; 32 Ala. 626. The information one of the appellants received, and upon which he acted, was admissible evidence to repel the presumption of malice.—11 Ala. 620; 9 Ala. 625; 7 Ala. 622.

CHILTON, and ARRINGTON & GRAHAM, and STONE & CLOPTON, for appellee.

BRICKELL, C. J.—The appellee, plaintiff in the court below, sued on a bond for an attachment against his estate, executed by the appellants. The ground for the attachment as stated in the affidavit, was, that the plaintiff had money, property, or effects liable to satisfy his debts, which he fraudulently withheld. The action so far as the nature and character of the evidence necessary to sustain it, is to be considered, bears a closer resemblance to an action for malicious prosecutions, than to any other action at common law. It is necessary for the plaintiff to aver in his complaint, the falsity of the particular fact, or facts, which may be stated in the affidavit as the ground of attachment.—*Tiller v. Shearer*, 20 Ala. 507. The averment of the falsity of the affidavit, though it may be negative in form, and may involve proof of a negative, casts on the plaintiff the *onus* of supporting it by evidence either direct, or of circumstances from which the jury may fairly infer the untruth of the fact or facts stated

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in the affidavit. The right of recovery rests on the wrongful or vexatious use, (or both), of the extraordinary and harsh remedy by attachment in this forms the gravamen of the plaintiff's complaint.—*O'Grady v. Julian*, 34 Ala. 88.

"All questions of evidence," it is said by ABBOTT, C. J., in *Doe v. Pettell* 5 B. & Ald. 224, "must be considered with reference to the particular circumstances under which it is offered." The nature of the case, the character of the fact to be proved, the relation and situation of the parties, must be considered in determining the relevancy and consequent admissibility of evidence. "As a general rule," says GOLDTHWAITE, J., in *Snodgrass v. Br. Bnk. at Decatur*, 25 Ala. 174, "great latitude is allowed in the range of the evidence, when the question of fraud is involved. It is indispensable to truth and justice that it should be so; for it is hardly ever possible to prove fraud, except by a comprehensive and comparative view of the acts of the party to whom the fraud is imputed, and his relative position a reasonable time before, at, and a reasonable time after, the time at which the act of fraud, is alleged to have been committed." The same latitude must be allowed a party on whom the law casts the duty, in the first instance, of repelling an imputation of fraud.

The court admitted evidence on the part of the appellee, against the objection of the appellants, the tendency of which in connection with other evidence, was to show that the appellee had consigned to Swift, Murphy & Co., who were plaintiffs in the attachment suit, seventy-three bales of cotton, with instructions to ship the same to Liverpool, and not to suffer it sold for less than 12½d. per pound, and that they had promised compliance with these instructions. Further, if these instructions had been complied with, the cotton would have realized the appellee \$12,286 46-100, instead of the sum of \$11,008 93-100, for which Swift, Murphy & Co. had given him credit on the account against him, which was the foundation of the attachment suit. Further, that he had shipped Swift, Murphy & Co. two thousand and eight pounds of lint cotton, for which they had not accounted to him. Further, that he had been charged by S., M. & Co. a higher rate of interest on advances than eight per cent., at which latter rate they had promised to make the advances. In determining the admissibility of this evidence, it must be taken in connection with the evidence that immediately before the issue of attachment, the appellees had interviews with the member of the firm of Swift, Murphy & Co. who made the affidavit, and these facts were stated to him, as the reasons

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of the appellee for refusing payment of the demand they preferred against him, and were not denied by him. The appellee in these interviews, expressing a willingness to pay whatever was due S., M. & Co., and the member of the firm making the affidavit, stating that he knew the appellee was solvent, and would pay whatever he proposed paying. We can not doubt the admissibility of the evidence. It bore immediately on the relation of the parties, and tended to show that the appellee was not refusing payment of a debt he knew or believed just, but resisting a demand he regarded as unjust; thus in some measure contradictory of the material averment of the affidavit, that he was fraudulently withholding money, property, or effects, liable to the satisfaction of his debts. The debt may have been just in whole, or in part, and yet the attachment sued out wrongfully, or vexatiously. Indebtedness alone will not justify a resort to the remedy by attachment, not even, when coupled with pecuniary embarrassment, or actual insolvency.—*Floyd v. Hamilton*, 33 Ala. 235; *Lockhart v. Woods*, 38 Ala. 631. The appellee was under the burthen, not so much of repelling the fact of indebtedness, as of the imputation of the corrupt intent and act imputed to him by the affidavit; the affirmation of which, and not the fact of indebtedness alone, authorized the issue of the writ. True, if there was no debt, the attachment was wrongfully issued, though a cause existed which would have authorized its issue, if there had been a debt.—*Lockhart v. Woods*, *supra*. But in the attitude of this case, the fact the appellee was compelled to controvert, was the fraud imputed to him by the affidavit; and it is this attitude,—the circumstances under which the evidence is offered,—that must be kept in mind in considering its admissibility. If the situation of the parties was changed—if the evidence could be dissociated from the nature of the fact to be proved—if the object of the evidence was different, it is not difficult to conceive of cases in which it would be inadmissible. Fraud is not by law, or in common charity, imputable, when the facts and circumstances out of which it is supposed to arise may consist with purity of intention. To justify its imputation, the facts must be such, that they are not explicable on any other reasonable hypothesis.—*Steele v. Kinkle*, 3 Ala. 358. Placing the jury, just where the parties stood when the attachment issued, with evidence of their relation, and of the acts and declarations of the appellee known to the plaintiffs in attachment, was the most legitimate mode of showing the truth or falsity of the affirmation

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of fraud, made in the affidavit. And it was their province to say, whether taking all the facts and circumstances together, fraud was proved or disproved. It is actual fraud, an evil intent to hinder and delay creditors, not a mere refusal or failure to pay debts, which will support the accusation that a debtor is fraudulently withholding his property from the payment of his debts. Security to, and protection of creditors against the fraud, is the object of the law, in authorizing the issue of an attachment, when it exists. The existence of the fraud, and of the evil intent, can not be deduced from the mere refusal of a debtor to pay a debt, against which he honestly believes he has a valid defence, though it should be shown he was mistaken, and that the debt was justly due. If the plaintiff in attachment was under the duty of showing affirmatively, the fact, the appellee was compelled to negative, he must have given some other evidence than that of the justness of his debt, and the refusal of the appellee to pay it. The evidence must have been directed to the fact of the ability of the appellee to make payment, and to the further fact, that with an evil intent, an intent to hinder, delay, or defraud, he withheld money, property, or effects, which by law were liable to the satisfaction of the debt. The intent is matter of inference from the acts and declarations of the appellee, at or about the time of the issue of the attachment, and of the circumstances surrounding the parties and their relations. These it would be competent for the plaintiff in attachment to show; and when the situation of the parties is changed—when the burthen of proof is on the appellee to negative the imputation of fraud, evidence so far as it is relevant—so far as it conduces to negative the imputation—of the acts and declarations of the appellee, at or about the time of the issue of the attachment, of which the plaintiffs in attachment had knowledge, and of all the circumstances, surrounding the parties, and of their relations should be admitted to the jury, that they may determine whether the just inference, is, that the appellee had fraudulently withheld property from the payment of his debts.

The objection to the admissibility of the evidence, most earnestly pressed by the counsel for the appellants, is, that in effect it was a denial of the validity of the debt on which the attachment was issued, and that the judgment in the attachment suit conclusively established its validity. If the evidence had been introduced for the purpose of controverting the debt on which the judgment was founded, it would

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have been clearly inadmissible.—*Jones v. Kirksey*, 10 Ala. 839. That judgment of necessity affirmed the existence of the debt claimed of the appellee, and is conclusive on the parties, whenever the fact of indebtedness is again in issue between them, whether directly or collaterally. The statute forbids a defendant in attachment, by plea or otherwise from contesting in the attachment suit, the truth of the facts stated in the affidavit for the issue of the writ. These it is intended shall be the subject of controversy and adjudication, only in a distinct, independent suit on the bond, or in a proper case, it may be in an action on the case for the malicious use, or rather abuse of the writ. A judgment is conclusive only of matters in issue, or necessarily involved in the issue in the suit in which it was rendered.—*Chamberlain v. Gaillard*, 26 Ala. 504; *Wittick v. Fraun*, 25 Ala. 317. It has no operation on other matters not capable of litigation in the suit. The truth of the fact stated in the affidavit—the fraud imputed to the appellee was not involved in the judgment in the attachment suit. Evidence is often admissible for one purpose, when inadmissible for another and distinct purpose. A party apprehending that it may operate injuriously to him in respect to matters of which it is inadmissible, can by requesting from the court proper instructions, have it limited in operation solely to the purposes for which it is admissible. The court admitted the evidence, for the single purpose of enabling the jury to determine whether the fact of fraud charged in the affidavit was true, or untrue; and for that purpose it was in our judgment admissible. The judgment in the attachment suit was conclusive of the existence and validity of the debt on which it was founded. If the appellee had proposed controverting that fact, the judgment would have estopped him. This is the extent of the decision in *Jones v. Kirksey*, 10 Ala. 839. The proposition in that case, on which the court was passing, was, that suing out an attachment on a usurious debt was *per se* wrongful and vexatious, and all the court decide is expressed in this sentence: “We came then to the conclusion, that the judgment in the suit established the validity of the debt sued for, and it therefore becomes immaterial to inquire how far a party is responsible for suing out attachment process for a usurious demand, as, until that judgment is reversed, set aside, or its validity impaired by the decision of some other competent tribunal, it must be considered as conclusive of probable cause, so far as the matter of indebtedness enters into the question.” But of the facts, that though a just debt exists,

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which show, or tend to show, the attachment was wrongfully or vexatiously sued out, which the defendant is by statute prohibited from putting in issue, in the attachment suit, the judgment is without operation.—*Sharpe v. Hunter*, 16 Ala. 765.

We do not understand the record of the judgment in the attachment suit, affirms the personal presence of the appellee when it was rendered; but that his appearance was *by attorney*. The evidence therefore that he was not personally present, and the cause of his absence, was not contradictory of the recitals of the record. We are of opinion it was competent for the appellee to show not only his absence, but the cause of it. The question is of fraud, and whatever fact bears on the good or bad faith of the appellee throughout the whole transaction, was properly admissible in evidence. The jury would naturally and justly, have been inclined to draw inferences unfavorable to his sincerity in the denial of the justness of the debt preferred against him, from the fact that the creditor had obtained judgment for its full amount. When his absence, and its cause, was shown, it was for them to say, how far these inferences were lessened.

By force of the statute, whenever an attachment is *wrongfully* sued out,—that is sued out without the actual existence of any one of the grounds on which its issue is authorized, whatever may be the good faith of the party suing it out, and however honest his belief that cause existed—the defendant is entitled to recover in an action on the bond, the actual damage he may sustain.—Code of 1876, § 3317; *Kirksey v. Jones*, 7 Ala. 622; *Alexander v. Hutchinson*, 9 Ala. 825. Injury to the plaintiff's business and credit, is a legitimate ground for the recovery of actual damage.—*Donnell v. Jones*, 13 Ala. 490; *Goldsmith v. Picard*, 27 Ala. 142. The averments of the complaint authorized the introduction of evidence of a *general* loss of credit, but not evidence of special injury from *loss of credit with particular persons*.—*Donnell v. Jones*, 13 Ala. 490. Within this limit the evidence was confined by the City Court, and its rulings in this respect seem to us supported by *Donnell v. Jones*, *supra*, S. C.; 17 Ala. 679; *O'Grady v. Julian*, 34 Ala. 88.

Illegal evidence, whether it is given by a witness in open court, or contained in a deposition, may be objected to, and should on motion be excluded at any stage of the proceedings.—1 Brick. Dig. 887, § 1190. It was not competent for the witness Murphy to state his attorneys informed him of facts other than the particular facts he narrated, *to authorize*

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an attachment. The facts themselves should have been stated, and not merely his opinion that they were such as to authorize a resort to the writ.

There are several exceptions to charges given and refused, but of these two only, are insisted on in the argument of counsel. The first of these refers to the refusal of an instruction requested, that to support the averment that the attachment was sued out vexatiously, the *onus* was on the plaintiff to prove malice towards him, by the party suing it out. If the instruction had been given, the jury would have been misled into the supposition, that the malice necessary to support the averment, was personal ill-will to the plaintiff, or revenge, or some kindred malignity. It is not malice of this character, which is an essential element of the vexatious suing out of the writ. A party may in extreme eagerness to collect a debt or to obtain security for it, without probable cause resort to an attachment; and the absence of probable cause, coupled with the unlawful act of suing out the writ, is the vexatious or malicious abuse of the process, against which the statute intends to guard, and for which the jury are authorized to give vindictive damages. Code of 1876, § 3318. The true principle is thus stated in *Wills v. Noyes*, 12 Pick. 328: "The malice necessary to be shown in order to maintain this action, is not necessarily revenge or other base and malignant passion. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, constitutes legal malice."—See also *Kirksey v. Jones*, 7 Ala. 622.

The facts referred to in the ninth charge, given on request of the appellee, certainly did not warrant an attorney in advising a client that an attachment could properly issue, and this is all the charge asserts. If the appellants apprehended the jury would infer from it that the advice of counsel though erroneous, if acted on honestly, would not protect them against the presumption of malice, a charge to that effect should have been requested. A reversal can not be had, because of an instruction correct in point of law, merely because of its tendency to mislead. The error is capable of correction by an explanatory charge, which must be requested.—1 Brick. Dig. 344, § 129.

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The result is, the judgment of the City Court must be affirmed.

STONE, J., not sitting.

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Injunction.

1. *The act authorizing cities to subscribe to the stock of railroad companies is constitutional.*—The “act to authorize the several counties, towns and cities of this State to subscribe to the capital stock of such railroads as they may consider most conducive to their respective interests,” is a valid law.

2. *The Federal courts can not be interfered with by those of the State.*—It is an established principle that when matters within the concurrent jurisdiction of both the State and Federal courts have been subjected to the control of one of them, there can not be an unnecessary interference therewith by the other.

3. *A suit at law in a Federal court can be enjoined only by the same court.* A defendant, sued at law in a Federal court, who has an equitable defence, or is entitled to the benefit of an injunction, should file his bill on the equity side of the same court. No tribunal of a State can enjoin such a suit.

4. *Courts do not judicially know the members of a firm.*—What individuals transact business under a firm name, courts can not judicially know. It is only the persons that compose a partnership of whom they can take cognizance, upon whom their process can be served, and against whom their orders and personal decrees can be enforced. The court has no jurisdiction of unknown persons engaged in business together, under a name which is not the name of an individual or of a body corporate, and can not render a decree against them.

5. *Section 2904 of the Code applies only to suits at law.*—Section 2904 of the Code of 1876 does not relate to proceedings in a court of equity.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

The facts are contained in the opinion.

BARNES & SON, and BRAGG & THORINGTON, for appellant.

1. The equity of the bill is unassailable. It rests on the familiar doctrine that, although the bonds have been declared void, they are negotiable paper, payable to the bearer, not yet due, and may pass into the hands of *bona fide* holders for value, who may subject the city of Opelika to harrassing suits and expensive annoyance.—1 Vesey, 3; 1 John’s Chan. Rep. 517; 1 Story Eq. Jur. §§ 695 to 705-706; High on Inj. §§ 7097-12; 24 Ala. 355; Willard’s Eq. Jur. 358-361; 9 Wall. 364; 44 Verm’t, 450-6; Caldwell (Tenn.), 313.

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2. Timpson and Tappan are neither parties nor privies to the suit at law in the United States court. This being true, the bill is an original bill, to the extent that it affects all the bonds and coupons not covered by the interest owned in them by R. C. Daniel.—*Dunn et al. v. Clark et al.* 8 Pet. 13. And no case can be found where the Supreme Court of the United States has ever made a decision in conflict with the principle settled in that case. Yet, in this case the singular spectacle is presented of a State Chancery Court deciding that the appellant must file a bill on the equity side of the Federal court. This is the whole point in the case.—8 Pet. *supra*; 14 Wall. 81; 24 How. 460; 3 Wall. 344-347; Hempstead Rep. 472. This suit does not come within the principle established or announced in *Wiswall v. Sampson*, 14 How. 52. It is essentially a different case. It is an ordinary action at law upon coupons, not secured by any mortgage, or other lien upon property.—Authorities, *supra*.

3. The cases in 9 Wall. 409 and 415, decide nothing more than that the process to enforce a judgment rendered by United States courts can not be interfered with, or paralyzed by proceedings in a State court.

4. The decree of the Chancery Court of Lee county is conclusive between the parties.—16 Ala. 271; 18 Ala. 668; 31 Ala. 234; 20 Ala. 798; Revised Code, §§ 3397, 3398, 3400. And the city of Opelika has the right to set it up, and invoked its protection against Daniel, who has no other interest in the bonds and coupons than that arising from a champertous contract, and against the other defendants who are only the attorneys and agents of these parties.—4 Otto, p. 278.

5. Although the appellant may have a remedy at law, if the power and machinery of a court of equity are necessary to do complete justice between the parties, its jurisdiction will be sustained. This is true of the Federal courts as it is of those of Alabama.—2 Sumter, 454; 2 Wood & Minot, 23; 3 Otto, 549.

SAYRE & GRAVES, and RICE, JONES & WILEY, for appellees.—1. The questions are these: Can a State court deprive a Federal court of jurisdiction given it by law? Can a State court interfere with or control the action, proceeding or process of a Federal court? Can a State court deprive a party of the right given him by law to invoke the jurisdiction of the Federal court? As the case now stands, the Federal court has full jurisdiction to determine the whole matter.

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And upon all principle the jurisdiction of the United States court having attached, it ought not to be disturbed.

2. If there be any matter of equity in the bill, it ought to have been filed in the Federal court, which would have jurisdiction of all parties, as well as of the subject-matter. 22 Wall. 250. The Federal courts have jurisdiction of a certain class of cases. The object of the bill is to deprive them of their jurisdiction and the parties of their rights. The Federal and State courts have rarely come in conflict, but if a suit like this can be maintained, the conflict is inevitable. The question is fully discussed in these cases: 7 How. 612; 6 Wall. 195-9; 9 Wall. 409, 415; 1 How. 624; 8 Pet. 1.

3. If complainant be entitled to an injunction at all, it is clear that it is unnecessary to make the mere agents, or attorneys, or bailees, of the real owners of the bonds defendants.—38 Ala. 17; 48 Ala. 287. The bill should have been against those only who own and have interest in the bonds, and against whom a decree is sought. The decree dissolving the injunction is free from error, and must be affirmed.

MANNING, J.—In this cause, the prayer for an injunction, and other relief, is based on two grounds. One of them is, that the “act to authorize the several counties, and towns and cities of the State of Alabama, to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests,”—approved December 31st, 1868,—was not passed in conformity with the constitution; and that the city bonds of Opelika, now in controversy and purporting to have been issued by virtue of said act, are therefore void. But it has very lately been decided by this court, in *Fort v. The City of Eufaula* (at this term), that the statute was not obnoxious to that objection, and must be regarded as having been a valid law. This ground or cause of suit, and foundation for the injunction consequently fail.

The other ground insisted upon is this: A decree was heretofore, in the year 1873, rendered by the Chancery Court of Lee county, in this State, in a suit brought by certain taxpayers of Opelika, on behalf of themselves and others, against the city and its municipal officers, and against the assignees in bankruptcy of the bankrupt railroad corporation to which the city bonds and coupons in controversy were issued, and against the firm of Henry Clews & Co., of

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the city and State of New York, who claimed to be the holders of said bonds and coupons, by which decree it was adjudged, for reasons set forth in the bill of complaint, that said bonds and coupons were not issued according to law, and were null and void in the hands of the said Henry Clews & Co., and they and all the other defendants were personally enjoined from ever endeavoring to coerce the payment of them, and the city authorities of Opelika were prohibited from levying a tax for that purpose. It is represented further by the bill in the present cause, that Richard C. Daniel, of Memphis, in the State of Tennessee, plaintiff in an action at law in the Circuit Court of the United States at Montgomery, has sued this complainant therein, to recover of it the amount of 119 coupons for interest belonging to the same city bonds; that he is not the owner or *bona fide* holder of them, but has undertaken to collect them at his own expense, upon a stipulation that he shall have one-sixth or some other part of the proceeds, according to an agreement made with one Tappan, of New York, as assignee or trustee in bankruptcy of Henry Clews & Co. of that city, and with one Timpson, also of the same city, as assignee or trustee in bankruptcy of another firm of Henry Clews & Co. of New York,—in each of which firms composed of different persons, the same Henry Clews was one of the partners and both of which became bankrupts and were adjudged to be so, in the year 1875.

The bill further alleges that the said city bonds, twenty-five in number, of one thousand dollars each, with coupons for interest payable semi-annually,—are now, as complainant is informed and charges, in the hands of Josiah Morris & Co., bankers of Montgomery, Alabama, as agents of said assignees and Daniel, or of some or one of them,—or in the hands of *Sayre & Graves*, or of Rice, Jones & Wiley, attorneys of the same place, for the same parties, as such attorneys,—but of which of them, complainant does not know. The assignees, Tappan and Timpson, and Daniel in whose name the action aforesaid is brought, and the said agents and attorneys in whose, or some of whose hands, the said bonds and coupons are charged to be, are all made parties defendant to the present bill. And, in accordance with the prayer of the bill, an injunction was issued to restrain them, or any of them, from prosecuting said action at law,—or from disposing or attempting to dispose of said bonds or coupons, or in any way changing the custody or control of the same. The bill prays

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also that the court will decree that they be delivered up and cancelled.

The injunction having, upon motion, been dissolved by the chancellor, an appeal was taken to this court.

So far as the injunction relates to the prosecution of the action in the Federal court, and was intended to restrain it obviously, it was properly vacated. To preserve harmonious the relations between the State tribunals and those of the United States, it was early seen that when matters that were within the jurisdiction of both, had been subjected to the control of one of them, there should not be any unnecessary interference therewith by the other. Numerous decisions have been made, recognizing and enforcing the observance of this duty.—*Ex parte Cabana*, 1 W. C. C. 232; *Diggs v. Walcott*, 4 Cranch, 179; *City Bank v. Skelton*, 2 Blatchf. C. C. 14, 26; *Peale v. Phipps*, 14 How. 368; *Hyde v. Stone*, 20 How. 170; *Wallace v. McConnell*, 13 Pet. 136; *Hagan v. Lucas*, 10 Pet. 400; *Taylor v. Carryl*, 20 How. 584; *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 335; *Duncan v. Darst*, 1 How. 301; *McNutt v. Bland*, 2 How. 1; *Ableman v. Booth*, 21 How. 506; *Brown v. Clark*, 4 How. 4; *Pullian v. Osborne*, 17 How. 471.

There are many cases, though, in which the parties interested in them have a right to insist that they shall be determined only in a court of the United States. This is so, in controversies "between citizens of different States." (Const. of the U. S. art. 3, sec. 1, cl. 1). In such instances, a concurrent jurisdiction exists in the State courts, only by the consent, as it were, or acquiescence of such parties: for when sued there, they may, upon proper application, in due time have the cause removed out of that tribunal into a court of the United States; which must, thenceforward take cognizance of and determine the same. And when the suit, in a controversy between citizens of different States, is thus transferred to, or is originally brought in a Federal court, unquestionably a State tribunal or officer has no authority by injunction, or otherwise, to hinder either party from being freely and fully heard in that court, and having its judgment upon the matter in controversy. The right to this, as we have seen, is expressly given by the constitution of the United States. And it is ordained in the same instrument, that: "This constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the constitution or laws

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of any State to the contrary notwithstanding." And "all executive and judicial officers,—both of the United States and of the several States," are "bound by oath or affirmation to support this constitution," (article 6).—See, also, *McKim v. Voorhees*, 7 Cranch, 279; *Kendall v. Winsar*, 6 R. I. 453; *English v. Miller*, 2 Rich. Eq. 320; *Dunn v. Clarke*, 8 Peters, 1.

A defendant sued at law in a Federal court, who has an equitable defence thereto, or is entitled to the benefit of an injunction, should file his bill to avail himself thereof, on the equity side of the same court, and may in a proper case do so, even after judgment is rendered.—*Freeman v. Howe*, *Buck v. Colbath*, and *McKim v. Voorhees*, *supra*; *Dunn v. Clarke*, 8 Peters, 1. Such bills are not regarded as original bills, but as means of defending or renewing in another mode, the litigation previously begun. They may, therefore, be filed on the equity side of the Federal court in which that litigation was properly instituted, even though by a change of residence of one of the parties, both of them have become citizens of the same State.—*Dunn v. Clarke*, *supra*. The plaintiff in such an action may also be brought as defendant into the same court, on the equity side of it, by service of process on his counsel in the action.—*Id.*; *Ibid*.

4. Or, if the action in the Federal court be still pending, and the defence be a legal one, it may be set up in that action, as well as in an action by and against the same parties in a State court. In cases of which the courts have concurrent jurisdiction, what is a good and valid defence in one, is such, necessarily, in the other. If there be a difference in the judgments of the two courts, on the same state of facts, one or the other must be in error. And it does not belong to an inferior court of either jurisdiction, to correct the error of an inferior court of the other,—or to assume that it will commit error, and make that assumption the sole basis for a suit in equity to restrain a party from using or negotiating a security he has acquired.—*Town of Venice v. Woodruff*, 62 N. Y. 462.

5. Counsel for complainant here concede, and did so at the hearing before the chancellor, that so far as the injunction related to the coupons sued upon in the action brought by Daniel and restrained him from prosecuting that action, it was properly dissolved. But it is insisted that in respect to the bonds and the other coupons, which are not sued on at all, the City of Opelika is entitled to have them delivered up and cancelled by a decree in this cause, and to have the

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injunction prohibiting the transfer of them in the meantime, re-instated. And the ground—the only one remaining,—upon which this contention is maintained,—is, that the Chancery Court of Lee county, in 1873, by its decree in the suit therein, declared said bonds and coupons void, in the hands of Henry Clews & Co.

6. In that suit it was prayed that Henry Clews & Co., described to be a firm of bankers of the city and State of New York, should be made a defendant. The persons composing the firm were not made parties, nor were their names set forth, for the reason, as the bill alleges, that it was not known to complainants who those persons were. And there was no prayer that they should be made parties when known, nor did they appear in the cause by any solicitors of the court. It now appears also by the bill in the present cause, that there were two firms in the city of New York, of the name of Henry Clews & Co., composed in part of different persons, both of which firms in the year 1875, became and were adjudged to be bankrupt.

According to the bill of complaint in the suit against the city of Opelika and others, in which the decree referred to was rendered,—there was no person existing, natural or artificial, of the name of *Henry Clews & Co.* And it is only a person, of one kind or the other, against whom such a suit could be maintained. What individuals do business at any time, as partners, under the firm-name of Henry Clews & Co., or A. T. Stewart & Co., or any other name, courts can not judicially know. It is only the persons that compose a partnership of whom they can take cognizance, upon whom their process can be served, and against whom their orders and personal decrees can be enforced. And when it is disclosed that a name used as that of a defendant in a bill of equity, is not the name of any individual or body corporate, but is that by which a number of unknown persons transact a certain kind of business, together, it is made apparent that without more, the court has no jurisdiction of such persons, or authority to render a decree against them.

7. We have, it is true, a statute, (Code of 1876), section 2904, in a chapter under the title,—“Proceedings in Civil Actions in Courts of Common Law,” which authorizes an action at law against a partnership by its firm name; and, when the summons has been served on one or more of the partners, a judgment therein may be rendered against the partnership, which shall bind the joint property of the con-

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cern. But that statute does not relate to proceedings in a court of equity.

8. Also by section 3774 (3340) of the Code, it is enacted that: "In cases where it is necessary to make any persons defendants to a bill, and the names of all or any of them are *unknown to the plaintiff, and can not be ascertained on diligent inquiry*, and he annexes to his bill an affidavit that the names of such persons are unknown, *that he has made diligent inquiry to ascertain the same,*" &c., they may be made parties by publication, "describing such unknown parties, as near as may be by the character in which they are sued, and with reference to their title or interest in the subject-matter." But there was no compliance on the part of complainants in the cause in Lee county with the requirements of this statute; and without such compliance, the persons doing business in the name of Henry Clews & Co., could not be brought within the jurisdiction of the court. All that is said in the affidavit made by a solicitor in the cause, on which the publication as to that firm was made by order of the register, is, "that the firm of Henry Clews & Co. who as a firm are made party defendant to the foregoing bill filed by John J. Smith, *et al.* in said chancery district, is a firm of bankers doing business under said firm name in the city and State of New York, and that their post-office is said city of New York." There is a total failure here to observe some of the most important provisions of the law on the subject. The persons composing the partnership mentioned were consequently not brought within the jurisdiction of the Chancery Court of Lee county, and are not bound by its decision.

In a case somewhat similar to this, where jurisdiction of a defendant in actions at law, was sought to be obtained by posting notice of the process according to a statute of Virginia, on the front door of a house which he had lately occupied with his family, as his home, and had left because the place in which it was situated was brought within the power of the Federal army during the late war,—a bill having been filed after the war, to restrain the execution of the judgments,—the Supreme Court of the United States said: "Notice to the defendant, actual or constructive, is an essential prerequisite to jurisdiction. Due process with personal service, as a general rule is sufficient in all cases. . . . Doubtless, constructive notice may be sufficient in certain cases; but it can only be admitted in cases coming fairly within the provisions of the statute authorizing courts to make for publication, and providing that the publication, when

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made, shall authorize the court to decide and decree." And it was held that the process was not served in this case, by being "posted on the front door of the party's usual place of abode," within the meaning of the law, and that the judgments against him were therefore void.—*Earle v. McVeigh*, 1 Otto, 507-8.

Without placing our decision on the important ruling of the Supreme Court of the United States in the recent case of *Pennoyer v. Neff*, (5 Otto, 714), we are compelled to hold that the Chancery Court of Lee county acquired no jurisdiction over the persons composing the firm of Henry Clews & Co.—and its decree was inoperative and void against them.

9. The facts set forth in the bill in that cause, as the ground for a decree therein are not made such in the bill in this cause. The claim to relief is based upon the decree alone in the Chancery Court of Lee county.

10. We are of the opinion that the citizens of Alabama, who are made defendants to this cause, as agents and attorneys merely of other persons,—are not proper parties to the suit. And as the other defendants are all non-residents, we should be inclined to hold if nothing else had happened, that the Chancery Court of Montgomery county had no jurisdiction of the cause. But as those defendants have appeared by solicitors to move for a dissolution of the injunction,—we make no decision on that point.

The decree of the chancellor dissolving the injunction must be affirmed.

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The Power of the Tax-Collector to Assess Escaped Taxes.

1. *When the legislature employs different language in a subsequent statute in the same connection, the courts will presume a change of the law is intended.* The legislature must be presumed to know both the language employed in the former acts, and the judicial construction placed upon them; and if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended, and after a consideration of the spirit and letter of the statute, will give effect to its terms according to their proper signification.

2. *In the interpretation of an act, all of it must be considered.*—In construing a statute, regard must be had to the whole act; and if need be, to

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other statutes passed on the same subject; for the meaning of a clause is sometimes shown by another that is not stated in connection with it.

3. *A person assessed imperfectly, has not escaped the assessor.*—One who has been assessed for taxation by the assessor, although in an imperfect manner, is not “a person who has escaped the assessor” within the meaning of the revenue law.

4. *No assessment of property should be made without notice to the tax-payer.* No assessment of property on the ground that it has escaped taxation should be made without notice to the tax-payer, if accessible; but the court does not decide that the assessment would be void if made without notice.

5. *To correct an improper assessment, the courts must not be sought in the first instance.*—If an erroneous, excessive or unauthorized assessment has been made, the remedy under existing laws does not lie in a resort to the courts in the first instance.

6. *The complaint of erroneous assessment should be made at the August term of the Commissioners Court.*—When a complaint is made of a regular assessment, it must be brought before the Court of County Commissioners (or courts exercising its powers), at the August term. And if the assessment has been made at an irregular time, complaint should be made to the first term afterwards.

7. *The collection of taxes should not be coerced till the Court of County Commissioners has acted in the case.*—If complaint be made that an assessment upon property which has escaped taxation is excessive, or illegal, it should not be collected by coercive process until the Court of County Commissioners has acted in the case. Upon its failure to correct an illegal or erroneous assessment, the courts of the country may redress the wrong.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

Patrick Robinson, tax-collector of the county of Montgomery, while engaged in the collection of taxes assessed during the year 1876, was informed that Lehman, Durr & Co. had escaped the tax-assessor as to some subjects of taxation and species of property for a number of years. Acting upon the information, and without making any demand on the said firm for a list of its taxable property, the said tax-collector proceeded, on the 12th day of March, 1877, to assess Lehman, Durr & Co. as persons who had escaped the tax-assessor in the years 1869, 1870, 1871, 1872, 1873, 1874, 1875 and 1876. And as the result of such assessment, the tax-collector demanded of the said firm on the same day, thirty-nine thousand six hundred and eighty-four 49-100 dollars as escaped taxes.

Thereupon, Lehman, Durr & Co. filed an application in the City Court of Montgomery, praying it to “grant a writ of *mandamus* directed to said Patrick Robinson, as tax-collector of said county, commanding and requiring him to vacate and annul said several pretended assessments, and forbidding and restraining him from reporting said several pretended assessments to the probate judge of said county;” or, if on the facts they are not entitled to the writ of *mandamus*, then that the

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“writ of *certiorari* issue directed to said Patrick Robinson, as tax-collector of said county, commanding and requiring him to certify said several pretended assessments to the court, and that the same be here quashed, vacated and annulled,” &c.

The petition for a writ of *mandamus* or a writ of *certiorari* was filed on the 16th day of March, 1877, and on the 24th day of the same month, Patrick Robinson, the respondent, “moved the court to strike it from the files of the court upon the following grounds, viz.: *First*, that said petition was not authorized by the law of the land; and *second*, that said petition did not show a case within the jurisdiction of the court.” The court overruled the motion, and the respondent excepted, and then filed his answer.

Among other matters, it “denies that the said Lehman, Durr & Co. rendered to the tax-assessor of the said county a full, accurate and complete list of all the taxable property owned by them in the said county, and a complete and accurate list of all the subjects of taxation for and on which the said Lehman, Durr & Co. were and are liable to pay taxes in said county in and for each, or any, or all of the following years, viz.: 1869, 1870, 1871, 1872, 1873, 1874, 1875 and 1876, and the respondent denies that the tax-assessor of said county assessed taxes against all the taxable property owned by said petitioners, or against, or on all the subjects of taxation on which the said petitioners were liable to pay taxes in said county, in and for each of the said years, or that the said petitioners paid State and county taxes on all their said property, or on all the subjects of taxation on which the said petitioners were liable to pay taxes in the said county in, and for each, or any, or all of the said years. This respondent denies, that on the 12th day of March, 1877, or on any other day, he assessed taxes on or against any property owned by the said petitioners, or on any subjects of taxation on which they were or are liable to pay taxes, which had been assessed for taxes by the tax-assessor of the said county, for either, or any, or all of the said years, and upon which the said petitioners had paid taxes that had accrued, and were and are due to the said State and county, in and for each, or any of the years above mentioned.”

To the answer of the respondent, the petitioners demurred; the court overruled the demurrer, and they excepted. The petitioners then filed a replication, which repeated the allegations that had been denied in the answer of the respondent, and averred the petitioners “are not liable to be assessed for taxation, or to pay taxes on salaries or gains, or incomes

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and profits; on money loaned and solvent credits, or credits of value; on money employed in buying or trading in paper; on property, real and personal; or on gross amount of commissions as factors, brokers and commission merchants, as set forth for the said several years respectively, in said answer of respondent, and on which he has assessed taxes for each of said years, as stated in his said answer."

The respondent demurred to the replication; the court overruled the demurrer, and the respondent excepted.

The court then granted "a writ of *certiorari* directed to respondent, Patrick Robinson, as tax-collector of Montgomery county, commanding and requiring him as such tax-collector, to return and certify to the court, on the ninth day of April, 1877, the several assessments of taxes made by him against said petitioners" for the years above mentioned. The writ was duly issued, and the respondent made his return in accordance with its requirements. The petitioners demurred to it; but the court overruled the demurrer, and the petitioners excepted.

"Before the overruling of said demurrer, the respondent claimed and requested the court should render its judgment dismissing said petition and *certiorari*. The court refused to render such judgment and adjudged that evidence outside of what appeared in the pleadings and proceedings should and would be received and heard as to the jurisdictional facts, denied by respondent, and that the *onus* of proof as to such facts was on the petitioners. To each of aforesaid rulings and decisions of the court (except as to *onus* of proof) the respondent duly excepted, and to said ruling as to *onus* of proof, the petitioners excepted.

"And thereupon, against the separate and successive objections and exceptions of respondent, duly made and taken successively as well as separately to each witness introduced by petitioners, and also to each part of the evidence introduced by petitioners," the petitioners read in evidence the books of assessments of taxes for each of the foregoing years. The petitioners then "introduced one McDuffie" as a witness, who testified "that he was tax-assessor of said county from about July, 1868, to December, 1874; that in the spring of 1869, while engaged in the assessment of taxes, he furnished the petitioners a blank printed list for assessment of taxes; that a few days afterwards he went to the office of petitioners for the purpose of assessing them for taxes, and called from said blank list, all the items of property and subjects of taxation which in any way related to the busi-

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ness of petitioners; and that he knew petitioners were engaged in the business of selling exchange, factors and commission merchants, and warehouse-men; that when he called out the item of salaries, gains, income and profits, for the preceding year, John W. Durr, one of the petitioners, said that they ought not to be assessed on said subject of taxation; as all the gains, incomes and profits of petitioners consisted of their commissions as factors, brokers and commission merchants, and for storage upon which they were taxed, and because the partners of the firm were liable to be taxed on their individual income derived from the partnership, and the witness being of the same opinion, declined to assess the firm thereon; that when he called the item of money loaned, solvent credits, &c., that said Durr stated that the indebtedness of said Lehman, Durr & Co. exceeded the amount of their money loaned, solvent credits or credits of value; that when he called the item of money employed in buying or trading in paper, or in regular exchange, said Durr stated that they had no money employed in that business—and upon statements of said Durr, and on such other information as he was able to gather, witness as tax-assessor declined to assess any amount on any of said subjects of taxation against said Lehman, Durr & Co. . . . The witness testified that these facts were substantially true of all the subsequent years in which he was tax-assessor, except the year 1870. In that year, he assessed the said firm “on \$50,000 as money employed in buying or trading in paper, or in regular exchange, and did assess them for taxation in each of said years respectively.” On cross-examination he testified “that he could not tell, without reference to said assessment books, on what subjects, or for what amounts he assessed petitioners during said years, but what he did assess against them was correctly shown by said assessment books.” He also testified “that he never swore petitioners to any assessments while he was assessor, but always attested the assessments.”

The petitioners then introduced W. G. Robertson, who testified that he was deputy-assessor during the years 1875 and 1876. And in the spring of 1875 he had several interviews with the petitioners relative to the assessment of the subject of taxation mentioned by the witness McDuffie, and like him declined to make any assessment upon them. But in the spring of 1876 he furnished a blank printed list of assessment to the petitioners, and made repeated applications to them for an assessment of these taxes. He was told that

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the petitioners "found great difficulty from the manner in which their business was conducted, in separating and determining the different amounts, which they should return on the different subjects of taxation; and that after discussing the matter, and on the assurance of the petitioners that it was the best they could do, agreed to take an assessment of \$75,000, covering all of the following subjects of taxation, namely: salaries, gains, incomes and profits of preceding year; money hoarded or kept on deposit subject to order; money loaned and solvent credits or credits of value; money employed in buying or trading in paper, or in regular exchange and gross amount of commissions of factors, brokers, and commission merchants.

"The court, having considered the cause upon the pleadings and evidence, adjudged that the assessments made on some of the subjects of taxation for each year from 1869 to 1876, both inclusive, were made without authority in law or jurisdiction in the collector; and adjudges that the same be quashed, annulled and vacated.

"The court further now adjudges the other assessments made by said tax-collector, as shown in his answer to the writ of *certiorari* were lawfully made; that Robinson, as tax-collector and special assessor, had the jurisdiction to make them, and that they were made in the manner as the law requires, adjudges they shall remain in full force and effect, and as to them the petition and writ of *certiorari* be dismissed. The court further adjudges, that petitioners, Lehman, Durr & Co., pay the cost of the proceeding, for which execution may issue. From which judgment the petitioners, so far as any assessment is held legal, and that respondent, Robinson, as tax-collector, had jurisdiction to make, and the dismissal of the writ of *certiorari* and petition, pray an appeal to the Supreme Court, which is granted upon their entering into bond and security for costs; and the judgment as to assessments here held good, and collections under them will be stayed and suspended upon their entering into a *supersedeas* bond in the sum of ten thousand dollars.

"From the judgment of the court, so far as the adjudging said assessments made without jurisdiction, and the judgment not dismissing the petition and writ of *certiorari*, the defendant, as said tax-collector, prays an appeal to the Supreme Court, which is granted upon his entering into bond for costs."

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WATTS & SONS, for Lehman, Durr & Co.—1. The question presented in this case is whether or not the tax-collector had any power to make in March, 1877, the assessment of taxes against Lehman, Durr & Co. shown in the record? The action of the tax-collector in making the assessment, is that of a tribunal of limited authority exercising judicial powers. Cooley on Taxation, 550; 5 Mass. 559; 3 Denio, 117; 35 N. Y. 238; 4 N. Y. 246, 352; 7 Barb. 133, 129; 43 ib. 540; 48 ib. 51; 19 ib. 22; 47 ib. 320; 53 ib. 239. When any person has authority to hear and determine a question, their determination is in effect a judgment.—Cooley on Tax. p. 268, note 3; Freeman on Judgm. § 531; 24 Barb. 419; 43 Ill. 428; 50 Ill. 424; 2 U. S. Dig. (N. S.) p. 668. And such judgments are conclusive till set aside by a competent appellate court. Authorities, *supra*; 2 Dutcher (N. J.) Law, 219, 228; 7 Barb. 127–133.

2. A board of equalization has no power to increase the valuation of property made by the assessor, without notice to the owner.—13 Cal. 325; 28 Cal. 107; 25 ib. 300; 34 ib. 432; 14 Conn. 72; 18 Conn. 189. Statutes authorizing collection of taxes must be strictly pursued—and this must be shown.—31 Ga. 700. When the report of the collector does not substantially comply with the act, a judgment rendered for taxes is void.—15 Ill. 279. The tax-collector can not assess except when authorized.—15 Ind. 48; 21 ib. 335. A judgment of a court of special jurisdiction must aver every fact necessary to confer jurisdiction upon such tribunal; nothing is presumed as to its jurisdiction.—Freeman on Judgments, § 517; 31 Ga. 700. The return to the *certiorari* must show every fact showing the jurisdiction of the tax-collector to make the assessment.—Cooley on Taxation p. 508–10; 30 Mich. 201.

3. The tax-collector exercising the power under the statute to assess taxes, must show the person assessed escaped the tax-assessor.—Section 7 Revenue Law; Acts 1875–6. p. 61. His ordinary powers are to collect taxes. This section gives extraordinary powers. The offices of tax-assessor and tax-collector are distinct, and the same person can not perform the duties of both at the same time. The collector has power to assess taxes of persons only who have *escaped the tax-assessor*, not the taxes of persons who have escaped taxation, and the power is only to assess such persons for the current year.

4. The legislature must be presumed to know the meaning of language, and when one set of words is used in one section,

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and another in another section, the presumption is that the legislators intended to convey a different meaning, if the two sets of words ordinarily have different meanings.

5. The exercise of the power of assessment is judicial. Authorities *supra*. And in all cases the jurisdiction must appear by recital of facts, showing authority to act. Every assessment must be submitted to the Commissioners Court for revision. The collector has no authority to revise the judgment of the assessor thus affirmed and approved by the Commissioners Court. But the construction insisted on by respondent necessarily gives this power. This of itself shows the legislature intended to give the power of assessment to those persons only who had not been assessed at all by the assessor—and which assessment had not of course been revised by the Commissioners Court. This construction does no harm to the State.

6. There is no provision of the statute for making an assessment without notice to the tax-payer. The assessor can make no assessment without personal application or notice to the tax-payer. Assessment upon information, and not upon a return of the tax-payer, is highly penal. And there is no authority granted to the tax-collector to assess taxes upon mere information. The failure of the tax-payer to give in his property upon a proper demand, is a misdemeanor. Acts 1875-6, p. 85, § 3.

An assessment by the assessor on the 12th of March, 1877, of property which had escaped assessment in several years, upon information, would have been void; and supposing the collector to have all the power of the assessor, where does he get the power to assess taxes upon information before the tax-payer has been put in criminal default by a demand and delinquency extending to the first of June?

7. To maintain that the tax-collector has power to assess persons who have been assessed by the assessor, but having some property which has escaped taxation, the counsel for respondent are driven to assert the following proposition, viz.: *First*, that "persons," used in section 7, p. 61, Acts 1875-6, does not mean what is ordinarily understood by the word, but persons *as the representatives of property which is liable to taxation*; and that taxes are not personal charges, but charges upon your property. This is refuted by Hillard on Taxation, p. 15.

That the words "persons who, or property which, have escaped taxation" are synonymous with the words "persons who have escaped the tax-assessor." Whereas, one escapes

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the act of taxation, and the other escapes the officer—tax-assessor.

That the words used in relation to the assessments by the assessor, must be interpreted in the section relating to assessments by the collector—which would be judicial legislation. The statement of these propositions is sufficient for their refutation.

8. It is said revenue statutes should be liberally construed, and some authorities are cited to support this view. But this construction is never indulged to sustain the extraordinary power of any officer where the acts affect the rights of the citizen. The legislature has the right to levy taxes, and in the exercise of this power, a liberal construction is allowed on the statute. But to hold that such a construction should be placed on the powers of tax-collectors, would be to reverse the decisions of all courts.

9. From the foregoing argument the following propositions are deduced, viz.:

The revenue laws constitute a system that must be so construed as to make its provisions harmonize.

The officer *specially* charged with the duty of making assessments is the assessor, and when he makes an assessment it is a determination of the property and subjects of taxation of the individual assessed liable to taxation, and of the value or amount. And this assessment must be examined by the Court of County Commissioners, and the errors, if any, should be corrected by it. This is a judicial ascertainment by a court of competent jurisdiction of the correctness of all assessments in which no errors are found.

The officer *specially* charged with the duty of collecting the taxes, is collector. His warrant of authority to collect is the assessment as corrected by the Court of County Commissioners. He has no power to diminish, enlarge or alter it in any respect, or to revise them.

However, some person or property may nevertheless escape taxation in previous assessments without being discovered at the time by the assessor, or by the Court of County Commissioners. But such property must be assessed by the assessor when discovered, and such assessment must be examined by the Court of County Commissioners, as the previous assessment had been.

But some persons may escape the assessor altogether whilst he is assessing for the current year, so that no assessment is made against them. In such cases the tax-collector may assess

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while engaged in the collection of taxes—and no power is given him to assess persons previously assessed.

By this construction no conflict of jurisdiction arises between the assessor and the collector; no unnecessary burden is imposed on the tax-payer, and all the provisions of the laws are harmonized.

JOHN W. A. SANFORD, Attorney-General, with whom were RICE, JONES & WILEY, for Patrick Robinson.—1. This is an application for a writ of *mandamus*, or a writ of *certiorari*, to be directed to the tax-collector of Montgomery county. The case must be considered as if there were two petitions; because the writs prayed for perform different functions. One sometimes lies to compel action; and the other to rectify action after it has been taken.—21 Ala. 772.

2. A writ of *mandamus* will lie only when there is a specific legal right, and no other legal remedy adequate to its enforcement.—2 Brick. Dig. p. 240, § 4. But the court will not require any officer to do an act which is not expressly and specifically authorized by law, in a proceeding by writ of *mandamus*.—41 Ala. 198; Cooley on Taxation, 523.

It may be addressed to an inferior court to compel action, but will not determine how that court shall act in a matter in which it has discretion.—21 Ala. 772. Here a *mandamus* has been prayed, requiring the tax-collector to vacate and set aside an assessment made by him in the regular discharge of his duties. It is argued that an assessor is a *quasi* judicial officer of limited power. And when the collector acts as assessor he becomes of the same species, with still more restricted authority; that his powers are judicial, and he is an inferior tribunal. If this be so, no writ of *mandamus* will run against the tax-collector because he has acted, and this writ will not be granted to correct the errors of an inferior tribunal, however gross they may be.—High on Ex. Rem. pp. 128–9; 18 Wend. 79, 92, 93; 24 Ala. 98. Therefore, if the tax-collector be a *quasi* judicial officer, the court erred in its refusal to strike from the files the petition for a *mandamus*.

3. But if the tax-collector be a ministerial officer, still the writ of *mandamus* should not be granted.—1 Mason C. C. Rep. 504; 1 Brock. 188. The petitioners, Lehman, Durr & Co., have other adequate remedies for any wrong the tax-collector may inflict. The board of revenue has ample powers to afford relief. It was established in 1875, Acts 1874–5, p. 513; and has all the powers of a court of county commissioners, Acts 1876–7, p. 162. This court has power to cor-

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rect assessments, Acts 1875-6, p. 67. Besides special sessions that may be called, the board has four regular sessions annually. On the 12th of March the assessment was made by the collector, and on the ninth of April thereafter the board held one of its regular sessions. To it an application for relief could have been made. This was a tribunal expressly provided to correct erroneous assessments. The appellants had an adequate remedy before it. The court, therefore, erred in entertaining the petition against the objection of the respondent.

4. The demurrer to the return of the respondent was properly overruled. The first ground could not be sustained. In such a proceeding, as in other cases, what is not denied or avoided is admitted when well pleaded.—High on Ex. Rem. §§ 461, 592. The other grounds of demurrer are also untenable. They are based on the want of authority in the collector to make the assessments. This is the core of the case. The power of the State to tax for public purposes, all persons and property within its jurisdiction, in the absence of constitutional restrictions, is unlimited.—4 Wheat. 316; 2 Pet. 449; 7 Wall. 71; Cooley on Tax. 41-42; Cooley on Const. Lim. 487. But its purpose to levy a tax must be expressed in a clear, certain and unambiguous statute, whose object is to raise revenue.—1 Barn. & Cresw. 424; 4 ib. 200-8; 6 ib. 241-2; 2 Barn. & Ad. 58; 3 Barn. & Ad. 641. And revenue laws must be construed liberally so as to effect the purpose of their enactment.—10 Wall, 395-406; 3 ib. 114-145; 3 How. 197-210; 2 Abbot U. S. Rep. 305-314; 38 Conn. 443-7.

5. The State then, has full power to enact revenue laws. They must be so construed as to effectuate the object of raising revenue. It provides for assessors and collectors. The latter to a limited extent performs the duties of the former. They can assess "persons who have escaped the assessor." And persons may be said to have escaped the assessor, when they have not been assessed at all, or when any property or subject of taxation has not been assessed. But this does not confer on the collector the power to revise the acts of the assessor. He assesses only what the assessor, for any cause, failed to assess. Such a bare failure, from a mistake of the law, can not estop the State.—1 Mason Rep. 504; 5 ib. 441-2; 23 Ark. 374.

6. After overruling the demurrer to the replication of the petitioners, the court should not have granted a writ of *certiorari*. Nor should testimony, oral and written, have been

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admitted to contradict the return.—Cooley on Tax. 535; 5 Allen, 13-16; 109 Mass. 270. Nor should the *certorari* have been issued at all to the tax-collector. He had reported the assessments to the judge of probate, who had entered them in the book of assessments as required by law. The transaction was no longer under his control.—Cooley on Tax. 531. In making the assessment the collector exercised no extraordinary powers. It was an ordinary duty, as plainly prescribed as any function required of him by law. To assess the persons “who had escaped the assessor” is as clearly his duty as to collect taxes from those regularly assessed. The return made to the writ of *certiorari* needs only to be certain to a common intent in general.—9 Conn. 456.

7. With the exception of a license tax, or a privilege or occupation tax, all taxes in Alabama are taxes on property. Even a poll-tax is such.—9 Ala. 556. And the legislature meant by the phrase to assess “persons who had escaped the tax-assessor,” to authorize the assessment of taxes on property that had escaped the assessor. Of course, this includes subjects of taxation as distinguished from taxable property. 38 Ala. 159-160. And no act of the assessor, not in accordance with law, can excuse the tax-payer’s failure to be assessed, or to pay taxes. Nothing, except the official act of the assessor, can protect the citizen from an assessment by the collector.—23 Ark. 374.

8. For the protection of the State, as well as the citizen, assessment is an inseparable incident to taxation, and no right of action arises until a “legal assessment is made by some proper authority,” and he can receive no discharge from his liability until an assessment is made.—Hilliard on Taxation, 291; Cooley on Taxation, 259-260. A person who has *partially* escaped the assessor differs from a person who has totally escaped him only in degree, and not in kind.

Neither *certiorari* nor *mandamus* is a proper mode of seeking relief which the petitioners desire, on the facts in this case.—Cooley on Taxation, 533, and notes; 1 Hill (N. Y.) 195; 15 Wend. 198.

9. In reviewing a case on *certiorari*, the court is confined to the record of the tribunal reviewed.—Cooley on Taxation, 535. Extrinsic evidence can not be received to contradict or control it.—Ib. 535; 12 Ala. 176; 5 Allen, 16.

10. No court has power to apportion a tax or to make new assessments, or direct another to be made by proper officers of the State. The levy of taxes is not a judicial function. 2 Otto, 614-15; 19 Wall. 660. The mistakes of an assessor,

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in making or omitting to make a proper assessment on a particular subject of taxation, or species of property, can not bar the claim of the State.—5 Pet. 187-8; 7 Cranch, 369-370; Cooley on Taxation, 143, and note 1. To prevent an escape from taxation, and secure protection to the State and the public, the revenue law carefully clothes the assessor and collector with concurrent powers, to make assessments of persons, who have escaped the assessor.

STONE, J.—Under the act “designating the subjects and sources, and prescribing the rates and mode of taxation,” approved February 9th, 1850—Pamph. Acts, 3—are found the following provisions:

“Sec. 3. . . . Property shall be assessed in the county where it is at the time, or was on the first day of March preceding the assessment; and in the case of land, where a tract lies partly in one county and partly in another, that county in which the greater part lies; but all property [is] liable to be taxed in some county; and the assessor, as well as the collector, and other officers, shall take care to make diligent inquiry, and embrace all property which has escaped taxation since the year 1843, as well as all that is liable at the time, so as to render the burthen equal and uniform as possible, on all tax-payers alike.”

In the act “prescribing the mode of electing, and defining the duties of tax-assessors and collectors,” approved February 11th, 1850—Pamph. Acts, 12—are the following clauses:

“Sec. 5. . . . And the assessor shall annually assess and value all real estate that may have been omitted, or have become taxable since the last assessment, and such as may have materially increased or decreased in value; and where the ownership is changed, he is required so to change the name as to show the real owner.

“Sec. 12. That it shall be the duty of each and every tax-collector diligently to inquire for any and all property of every species, subject to taxation by the revenue laws of this State, which from any cause may not have been assessed, either for the current year, or for any year since 1843, and particularly to inquire of any person or persons who may have recently moved into their respective counties from any other county or counties in this State, and who may not have paid taxes on their property, and to assess the same in the same manner, and under the same restrictions, that assessors, appointed by the provisions of this act are required

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to do ; and after such assessment is thus made, and entered into the said books above provided, to collect the taxes thereon, as if the same had been assessed by the assessor ; and the said tax-collector shall return the assessment thus made, under oath, to the several assessors of the counties in which said property is assessed, who shall add up the respective amounts, and make and send copies to the Comptroller, in the manner and under the same penalties imposed in reference to original assessments by assessors," &c.

The substance of the foregoing statutory provisions was carried into the Code of 1852. Speaking of the duties of the tax-assessor, that Code said : "Section 433. All property subject to taxation, and not assessed, in any year since 1843, must be assessed to the person such property should have been assessed, the year or years it escaped assessment ; and in such cases the assessment must show the years such property was not assessed, the assessment for each of such years, and the persons to whom assessed for each year."

Under the title "Duties of the tax-collector," that Code said : "Section 453. It is the duty of the tax-collector :

"1.

"2. To assess, as required under the provisions of this chapter, any property that has not been assessed, and to collect the taxes thereon.

"3. To note in writing any errors made in the assessment of property."

In the act "To establish revenue laws of the State of Alabama," approved February 22d, 1866—Pamph. Acts, 3—are the following provisions :

"Sec. 33. That whenever the assessor shall discover persons who, or property which have escaped taxation in any previous assessments, he shall assess the taxes thereon for such years as such persons or property have escaped taxation, and where he has reason to believe that any person who has been assessed, is about to leave the county, he shall at once notify the tax-collector, and on the failure of the tax-collector to act, he shall collect the taxes of such person, and pay the same over to the tax-collector, taking his receipt therefor.

"Sec. 52. That it shall be the duty of the collector, while engaged in the collection of taxes, to assess the taxes of all persons who have escaped the tax-assessor, entering up all such assessments in the back part of the books of assessments for each year."

The Revenue Law, approved February 19th, 1867, Pamph.

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Acts, 259, contains the same provisions, numbered as sections 32 and 51. Each of said statutes contains a repealing clause. The statute last mentioned enacts as follows:

"Sec. 108. That the act to secure taxes from transient dealers, and all laws and parts of laws conflicting with the provisions of this act be and the same are hereby repealed."

Under these statutes, the author of the Revised Code, in lieu of section 433 of the Code of 1852, substituted section 33 of the act "To establish revenue laws for the State of Alabama," copied above; and numbered the section 480 (433). This was done, manifestly, because the statute was the later expression of the legislative will, and the repealing clause in the act, repealed section 433 as it originally stood. So, section 52, copied above, of the Revenue Law of 1866, covers the ground of that portion of section 453 of the Code of 1852, which we have copied, and repealed it. The rule is, that if there be any part of the statute which can not stand with any of the provisions of a former law, to such extent the later enactment repeals the older. Yet, the codifier, while incorporating said section 52 in his Code, as section 501 (454e), still retained, in its entirety, said section of the original Code, and numbered it 496 (453). But, possibly we need not consider this.

Several revenue laws have been enacted, since the one of 1866.—See Acts of 1867, page 259; Act of 1868, page 298, sections 39 and 50; Act of 1875, page 3, sections 32 and 46, and Acts of 1875-6, pages 56 and 61, sections 6 and 7. In each of these enactments, when declaring the duties of the assessor, the language employed is, "whenever the assessor shall discover persons who, or property which have escaped taxation in any previous assessment, he shall assess the taxes thereon," &c. While, in speaking of the duties of the tax-collector, the language invariably employed is, "it shall be the duty of the collector, while engaged in the collection of taxes, to assess the taxes of persons who have escaped the tax-assessor." The act of 1868, approved December 31st, like the statutes of 1866 and 1867, repeals "all laws or parts of laws, of a general or special character, except those enacted for municipal purposes, upon the subject of taxation in this State." So also, the act approved March 19th, 1875, and the act approved March 6th, 1876, each contains a repealing clause, which would, of itself, repeal the provisions of the act of 1850, and the special sections of the two editions of the Code which we have been considering, independent of the repugnancy, which repeals by implication.

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Lehman, Durr & Co., a firm doing a somewhat varied business, had had their taxes assessed by the tax-assessor for each preceding year. The tax-collector, claiming that in each of the years since 1869, they were the owners of property and other subjects of taxation which should have been but were not assessed, proceeded on information to assess them for such alleged subjects of taxation, as *persons who had escaped the tax-assessor*. The question is raised, had he authority to do so?

It will be observed that while the statute of 1850 and the Code of 1852, employ substantially the same language in conferring power severally on the assessor and collector in the assessment of taxes which had escaped taxation, from 1866 to the present time the powers of these officers have been expressed in different language.

In Potter's Dwaris on Statutes, 175, speaking of the laws of their interpretation, it is said, "the design and intent of the former, where it can be indisputably ascertained, shall prevail; *quod verba intentioni inservire debent*. If such be the case, as a maxim of universal jurisprudence it will be of constant application: it will extend under partial modifications, to the interpretation of all instruments; wills, deeds and grants, equally with the construction of statutes." On page 200, the same author, quoting from V. C. Wigram, says, "In construing an act of parliament, the same rules of construction must be applied as in the construction of other writings."—See *Salkeld v. Johnston*, 1 Hare, 210.

Words must be construed in their popular sense, unless there is something in the writing which shows they were intended to be employed in some other sense. "The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and proper use; for *jus et norma loquendi* is governed by usage; and the meaning of words, spoken and written, ought to be allowed as it has constantly been taken."—Pot. Dwar. 193.

In construing a statute, regard must be had to the whole act; and, if need be, to other statutes passed on the same subject; for it frequently happens that the meaning of one clause is shown by another that is not stated in connection with it. The object being to ascertain the framer's intention in the use of the language he employs, that intention is oftentimes more certainly learned by comparing one clause with another, and noting their correspondences and differences. In Sedg. on Cons. and Stat. Law, page 200, it is said that

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"in construing any part of a law, the whole must be considered; the different parts reflect light on each other; and, if possible, such a construction is to be made, as will avoid any contradiction or inconsistency." So, in Pot. Dwar. 188, it is said, "it is the most natural and genuine exposition of a statute, to construe one part by another of the same statute, for that best expresses the meaning of the makers."—See also, *ib.* 189. So Chancellor Kent, 1 Com. 461-2, says, "it is an established rule in the exposition of statutes, that the intention of the law-giver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together."—See also *U. S. v. Collier*, 3 Blatch. 333.

"Statutes are to be so construed, if possible, as to give same effect to every clause, and not to place one portion in antagonism to another." A construction which leaves to a sentence or clause of a statute no field of operation, should be avoided, if any other reasonable construction of the language can be given.—*Brooks v. Mobile School Commissioners*, 31 Ala. 277; Sedg. Cons. and Stat. Law, 200; Pot. Dwar. 189, 194, 197; *Torreyson v. Board of Examiners*, 7 Nev. 19.; *Leversee v. Reynolds*, 13 Iowa, 310; *City of San Francisco v. Kelsey*, 5 Cal. 169; *Aldridge v. Mardoff*, 32 Texas, 204.

Words or phrases twice used in the same statute, are presumptively used in the same sense. "If the same words occur in different parts of a statute or will, they must be taken to have been everywhere used in the same sense."—Pot. Dwar. 194. But, "if there be a material alteration in the language used in the different clauses, it is to be inferred that the legislature knew how to use terms applicable to the subject-matter."—Pot. Dwar. 198. In *Edrich's case*, 5 Rep. 118, a question arose on varying phraseology in a statute. "The judges said, they ought not to make any construction against the express letter of the statute. . . and the several inditing and penning of the former part [of the statute] concerning distress given to executors, and of this branch, doth argue that the makers did intend a difference of the purviews and remedies, or otherwise they would have followed the same words."

In *Rich v. Keyser*, 54 Penn. Stat. 86, the question arose under two statutes, each of which gave to a landlord a summary remedy to dispossess his tenant who held over. The act of 1772 gave the remedy before two justices of the peace, when the term was ended, and three months notice to quit had been given, and the tenant had neglected and refused to do so. Under this statute it was ruled sufficient, if the three

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months notice to quit was given before the commencement of the proceedings, although after the termination of the lease. By the act of 1863, the remedy was given before a single justice or alderman. The language of the later statute was, "where any person or persons in this State having leased or demised any lands or tenements to any person or persons for a term of one or more years, or at will, shall be desirous upon the determination of said lease to have again and repossess such demised premises, having given three months notice of such intention to his lessee or tenant, and said lessee shall refuse to leave," &c. This statute further provided that on the hearing before the justice or alderman, it should be proved that the term is fully ended, "and that three months' previous notice had been given." It was contended for plaintiff that, as ruled under the act of 1772, it was sufficient under the later statute if the notice to quit was given three months before the institution of the proceedings to dispossess. The court, speaking of the act of 1863, said, "The phraseology of this section in both places where the notice is mentioned, does certainly imply that the notice is to be given three months before the expiration of the term. The expiration of the term is the period which the legislative language assumes, and "having given three months notice," means that at *that period* having given it; and *three months previous notice*, means previous to that period—the end of the term. . . . Herein the act of 1863 plainly differs from the act of 1772. Was the discrepancy accidental or intentional? The legislature of 1863 must be presumed to have known what the language of the act of 1772 was, and what judicial construction had been placed upon it. Then, knowing this, and yet not following it, but substituting for it different language, did they not mean that we should construe their language according to its ordinary import? I see no other ground for judicial construction to rest upon. Indeed, the words of a statute, when unambiguous, are the true guide to the legislative will. That they differ from the words of prior statute on the same subject, are an intimation that they are to have a *different*, and not the *same* construction; for it is as legitimate use of the legislative power to alter prior statutes, as to displace the common-law." In this case, it will be observed, the old statute had stood as a rule for giving notice in such cases for near a century, before the second statute was enacted.

The case of *Moses v. Newman*, 6 Bing. 556, raised the question of the construction of section 5 of the bankrupt act

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of 6 George IV. The language of the section is as follows: "That if any trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such, or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment or detention."

One Marshall had been arrested and committed to prison for debt, had lain in prison twenty-one days, and had been therefor adjudged a bankrupt. The suit was by the assignee, and the sole question was whether the bankruptcy should date from Marshall's arrest, or from the expiration of the twenty-one days of his imprisonment. In support of the first branch of the proposition, it was shown that under prior bankrupt laws, where the act of bankruptcy consisted in lying in prison for a given length of time under arrest for debt, the bankruptcy, by relation, took affect from the date of the arrest; and the Parliament, it was contended, must be presumed to have intended such relation under the present statute. But the court held otherwise. C. J. TINDAL, delivering the leading opinion of the court, said, "that in the one case, the act of bankruptcy shall be reckoned from the end of the twenty-one days; in the other, from the first arrest. And the distinction may be said to appear historically; for the clause of relation is omitted in the first statute, 1 Jac. I., ch. 15, inserted in the next, 21 Jac. I., ch. 19, and continued ever since till the passing of the 5 G. IV, and 6 G. IV, ch. 16, when it appears to have been omitted by design, the period of confinement constituting an act of bankruptcy having been materially abridged." PARK, J., said: "I am of the same opinion, and think the question historically clear; for when we observe the legislature sometimes inserting and sometimes omitting the clause of relation, we must presume their attention has been drawn to the point, and that the last omission, at least, is designed." BOSANQUET, J., said: "Seeing that this clause has been omitted after previous insertions, we must consider the omission designed." GASELEE, J.,

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concurring.—See, also, *Cantwell v. Owens*, 14 Md. 215. The following authorities are strongly corroborative of the same principle of construction: *Campbell v. Campbell*, 4 Bro. C. C. 15; *Rawlings v. Jennings*, 13 Ves. 39, 45-6; *Nanfan v. Legh*, 7 Taunton, 85.

Commenting on a question kindred to the one we are discussing, Chief Justice MARSHALL, in the case of the Schooner *Paulina's Cargo v. U. S.*, 7 Cr. 52, 60, said: "In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it. The legislature has declared its object to be to lay an embargo on the vessels of the United States, and to prevent the transportation of any article whatever from the United States to any foreign port or place; and therefore such transportation is prohibited. To prevent evasions of this law, certain acts which do not in themselves amount to a breach of the embargo, but which may lead to it, have been successfully prohibited under such penalties as the wisdom of Congress has prescribed. . . . But should this court conjecture that some other act, not expressly forbidden, and which is in itself the mere exercise of that power over property which all men possess, might also be a preliminary step to a violation of the law, and ought therefore to be punished for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would create a rule instead of applying one already made. It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply the rule to the case thus explicitly described—not to some other case which judges may conjecture to be equally dangerous."

Speaking of the legislative intent which is to govern in the construction of statutes, in Potter's *Dwarris*, 182, it is said, "it must be such an intention as the legislature have used fit words to express. Although the spirit of an instrument is to be regarded no less than its letter, yet the spirit is to be collected from the letter."

In *Cooley's Cons. Lim.* 55, it is said: "In the case of all written laws, it is the intent of the lawgiver that it is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination

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demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible, or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere."

What we have shown above is, we think, ample elucidation of the principles which must govern in the interpretation of chapter 5, section 6, and chapter 6, section 7, of the revenue law approved March 6th, 1876, under which the present assessment was made. It will be observed that for many years, commencing in 1850, the powers of the assessor and collector in regard to escaped taxes, were conferred in language substantially the same, and must, therefore, have been co-extensive. We have shown, further, that in the revenue law of 1866, and in every one since, there has uniformly been a difference in the language which defined their several powers, while the language applied to each has undergone no change. "Persons who, and property which have escaped taxation," is the stereotyped mandate to the assessor; while for the same unbroken period, the authority to the collector to assess, has been expressed in the words, "persons who have escaped the tax-assessor."

Under the rules above laid down, we now proceed to draw the conclusions applicable to this case, which we think those rules and principles force upon us:

First. The legislature, in speaking of the duties of the assessor, use the compound phrase, "persons who," and "property which." They must have had some object in using the last branch of the sentence; must have thought it embodied some idea, and that, that idea was not embraced in the first branch. To hold otherwise, would be to convict them of a persistent employment of language, having no aim or meaning; a mere tautology. It is our duty, if we can, to attach some meaning to every part of a statute. If, then, the words, "property which," have any independent meaning when applied to the assessor, then the powers conferred by that clause on the assessor are not conferred on the collector. Only "persons who have escaped the tax-assessor," are committed to his jurisdiction. The words, "persons who," being found in identical language in each grant of power, and the two grants being in one and

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the same statute, with no surroundings to indicate that they were employed in a different sense, it is our duty to presume the legislature, in each section, intended to convey the same and no other idea, and to confer the same and no other power, by the words, "persons who," which are common to both. If we hold that the legislature intended to confer the same powers on each of these officers, we thereby convict them of employing the words, "property which," without purpose or meaning, or, of using the words, "persons who," in one sense as to the assessor, and in another and larger sense as to the collector. Each of these constructions is alike forbidden by the principles and adjudged cases stated above.

Second. The legislature, at one time, conferred powers, in language substantially identical, on the assessor and collector, in reference to tax assessments previously overlooked, or withheld. Subsequently a change was made in the language of the statute, by which the powers were conferred on these officers in separate sections, and in changed and varying language. This changed language, differing as to the separate powers of the two officers, was preserved and persevered in, without alteration in any respect material to this case, in the several revenue statutes, extending through a period of five years. The authorities cited above show, that when the legislature makes a material change in the language of a statute, we must presume they intended what their changed language imports—a changed meaning.

Third. To hold that the collector has co-equal powers with the assessor in the matter of taxes of "persons who and property which have escaped taxation," is, in effect, to arm him with the authority to supervise and review all assessments made in past years by the assessor, whenever, in his opinion, such assessment is incomplete as to subjects of taxation, or values affixed, and this, running through all previous assessments; we can not think such was the intention of the legislature.

Fourth. We think the language of the statute, *ex vi terminorum*, forces a discrimination in the powers of the two officers. The transitive verb, *escape*, in the sense here employed, means "to avoid the notice of; to pass unobserved by; to evade." One who has been assessed by the assessor, although imperfectly, does not fall within either of these definitions. He has not *avoided the notice* of the assessor, has not *passed by him unobserved*, has not *evaded* him. In no sense, popular or natural, can it be affirmed of such person that he has "escaped the tax-assessor."

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Chapter 5, section 14, of the revenue law of 1876, fixes the rate of commissions to be paid the assessor for assessing taxes. After providing a tariff of rates for ordinary assessments, it adds: "Upon the amount of taxes assessed upon property which has escaped taxation in assessments for the previous years, ten per cent." The same rate is also allowed him for similar county assessments. It may be argued that under the construction we have given above to the varying phraseology as to the two officers, to be consistent, we must deny to the assessor all compensation for assessing taxes of "persons who" have escaped taxation in any previous assessment; as the law allowing the enlarged compensation to him only applies to "property which has escaped taxation." The phrase, "property which has escaped taxation," is much more comprehensive—much more nearly generic, than the phrase, "persons who." The former embraces everything covered by the latter, except the simple item of poll-tax. We all agree that the words "property," when employed in those sections, is the equivalent of *subjects* of taxation. To hold otherwise, would be to allow neither officer any compensation for either assessing or collecting taxes, other than those levied on property proper. Then, the phrase, "property which," is broad enough to take in all the subjects of taxation belonging to every tax-payer, whether he has personally *escaped the tax assessor*, or not, except the single item of poll-tax. It may be that the legislature omitted to provide compensation to the assessor, for assessing this one item of escaped poll-tax, through oversight or otherwise. We can only learn what they intended, from what they have said. It is theirs to command, ours to obey. When their language is plain, no discretion is left to us. We have no right to stray into the mazes of conjecture, or to search for an imaginary purpose to do equal justice to these equally meritorious public officers, and make such imaginary purpose an excuse for placing one construction—giving one unbending interpretation, to phrases essentially different. Better, far better, attribute this failure to accidental omission; a mishap from which the most cautious and practised draftsman is not always free.

Moreover, the language employed in fixing the compensation of the tax-collector for assessing such taxes as he is authorized to assess, follows neither the language found in either of the grants of power to assess escaped taxes, nor the language in which the assessor's compensation is conferred. After defining the scale of commissions for the collection of

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taxes, it adds, "on the amount of taxes by him assessed, ten per cent.," thus fixing the rate.

We do not think the language of the statute in declaring the compensation for assessing escaped taxes by the assessor justifies us in disregarding the plain canons of interpretation herein above laid down.

If it be contended that under the revenue law of 1866, which so far as the question we have been considering is concerned, has not been materially changed in ten years, the tax-collectors throughout the State have uniformly been in the habit of assessing the taxes on property which has escaped taxation in previous assessments, to the same extent as assessors have been authorized to do; that this was a cotemporaneous construction of the statute, by officers charged with its execution, and such construction may be looked to, as one of the aids in interpreting the language of the statute; we answer, first, that we do not know to what extent the habit has prevailed, or whether it has been sufficiently general, to entitle it to be considered as one of the aids in the interpretation. Second, such interpretation by non-judicial minds, should never be allowed to prevail, or exert influence in the construction of the plain and unambiguous language. When language is plain, there is no room for construction. Third, the statute of 1850, as we have shown in the opening of this opinion, conferred co-equal powers on the assessor and collector, in the assessment of back taxes, or property which had escaped taxation. That legislative authority existed without material modification for fifteen years; and during that time, it is fair to suppose—rather, it may be assumed, that assessments of such property were made by the assessor and collector indifferently, as the one or the other officer discovered property which had escaped assessment. This was clearly legal at that time. Persons engaged in assessing and collecting taxes are usually not much skilled in the law. The question of the changed powers of the two officers was never before raised in any court that we are aware of. These officers would be more likely to fall into and follow a habit they found prevailing, than to study the statute, or take counsel with a view of learning the extent of their powers under it.

We think if collectors, since 1866, have been in the habit of assessing back taxes co-extensively with assessors, it is to be credited rather to the precedent they found and followed, than to any interpretation they placed on the language of the statute of 1866, and those following it.

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The revenue laws have, with studied care and particularity of detail, provided that ample notice shall be given to the tax-payer, and opportunity afforded him to be present and be heard when taxes are assessed against him. The assessor is required to give thirty days notice of the time he will attend in each precinct, by bills posted at five or more public places in the precinct; and must attend twice in each precinct, that the tax-payers, thus notified, may meet him, and be present at the making of their tax lists, and after making and filling these two appointments, "he shall make a demand in person, or by deputy, upon delinquent tax-payers, or such as have failed to meet him at his appointments, wherever he may find them, and when unable to find them he may leave a written notice at the residence of such delinquent," &c. After all these prerequisites have been complied with, and not till then, having failed to procure "from any delinquent his list of taxable property before the first day of June, the assessor shall ascertain, from inquiry or otherwise, the property and other items of taxation upon which such person is liable to be taxed, to the best of his information and judgment."—See Rev. Law of 1876, chap. 5, §§ 2, 4, 5. And the act "to prescribe and regulate the mode of assessment in this State," approved February 8, 1877, Pamph. Acts, 3—makes more emphatic, if possible, the requirement that the tax-payer shall have the privilege of appearing before the tax-assessor, when his property is assessed for taxation.

It will be observed that under these statutes, before the assessor assesses any one's taxes on personal knowledge, or on information obtained on *inquiry*, he must first put him in the category of a delinquent, by affording him two advertised opportunities to meet him in the precinct, and there, by personal demand made on him, or left at his residence, if unable to find him. It may be said that these provisions relate to the regular assessment, and not to the exceptional assessments of property which has escaped taxation. True, section 6 chap. V, declares "that whenever the assessor shall discover persons who, or property which have escaped taxation in any previous assessment, he shall assess the taxes thereon for such years as such persons or property have escaped taxation." Nothing said in this section about notice, demand, or the presence of the tax-payer. *Discover*, is the language used. How discover? Is it reasonable to hold that such assessment is, at all times, to be made privately and *ex parte*? If on information, how obtained, how authenticated? How much information, and how communicated, is the assessor to

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have, on which he can say officially that he has *discovered* "property which has escaped taxation?" Is it consonant with the fairness of official dealings that the taxable property of any and every tax-payer shall be made the subject of an *ex parte* inquisition, when such owner is near at hand, and may be notified? Such is not the usual course of official transactions. We think that under the general policy indicated by the statute from which we have copied, no assessment should be made of property which it is alleged has escaped taxation, without notice first given to the tax-payer, if he is accessible. In the case of *City of Philadelphia v. Miller*, 49 Penn. State, 440, the Supreme Court of Pennsylvania, speaking of a tax proceeding, said: "Notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property." In *Darling v. Gunn*, 50 Ill. 424, it was said: "It is eminently just that no person should be deprived of his property without being heard; and it may be that he can not, until such opportunity is afforded, even in the assessment of taxes for the support of government." In *Builer v. Supervisors*, 26 Mich. 22, the court, Judge Cooley delivering the opinion, said: "The power to tax is indeed plenary; but taxation implies public interest; and in cases like these now in question, it also implies proceedings *in pais*, in some of which the tax-payers have a right to take part and be heard." In the case of *Cleghorn v. Postlethwaite*, 43 Ill. 428, it was said: "The law never designed that property owners should be put so completely in the power of the assessor, as he would be, did the assessor have the authority, secretly, and without the knowledge of the owner, to re-assess the property." Judge Cooley, in his work on Taxation, 266, says: "We should say that notice of proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law' for these cases; and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended, or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

But we do not decide that an assessment of escaped taxes, made without notice, is, for that reason, void.

The tax-collector had no authority to make the assessments shown in this record, and the same are void.

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What is the remedy when there is an erroneous, excessive, or unauthorized assessment of taxes? Evidently, not an appeal to the courts, in the first instance. Section 3, chapter VII., of the Revenue Law of 1876, provides a remedy that must be first invoked. If the complaint be of the regular assessment, it must be brought before the Court of County Commissioners (Board of Revenue, in this county,) at the August term. If the assessment be made at an irregular time, it should go to the first term of the court afterwards; or, to a special term, as the case may be. Assessments of "property that have escaped taxation;" if complained of as excessive or illegal, should not be collected by coercive process, until passed upon by the Court of County Commissioners, or the court filling its place. Less than this would not be "due process of law."

Should an illegal or erroneous assessment fail of correction in the Court of County Commissioners, we will not say the courts of the country will not redress the wrong. The present case was not passed on primarily by the Board of Revenue, and the City Court had no jurisdiction of the case.

In the appeal of Lehman, Durr & Co. the judgment of the City Court is reversed.

The appeal of Patrick Robinson is dismissed. The costs of the two appeals in this court and in the court below are imposed equally on the two parties.

BRICKELL, C. J., dissents from that part of the opinion which declares that the powers of the tax-assessor and tax-collector, as to property which has escaped taxation, are different: but concurs in the conclusion as to jurisdiction of the questions raised.

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Action for Damages.

1. *An employee can maintain action for damages against employer when in fault.*—An employee, who is injured in the course of his service, has recourse against the employer for damages when the injury is caused by the fault of the employer; but not, when it is caused by the fault or negligence

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of another employee, unless the employer is chargeable for the employment of an incompetent person.

2. *A corporation is liable for damages caused by the employment of unfit persons.*—If a railroad corporation authorizes an officer to employ persons to maintain and repair the road, and to carry on its business, and he employs, or retains persons unfit for the service in which they are engaged, and injury results to another employee of the corporation from this cause, it is liable. The officer in such matters is substituted for the corporation, and his negligence is the negligence of the corporation.

3. *A corporation is liable for damages arising from the improper selection of an officer.*—When the duties entrusted to an officer are such as can not properly be performed by the corporation itself, then his negligence is not that of the corporation, unless it has failed to exercise due care in the selection of a proper officer.

4. *The nature of the duties required, determines the character of the employee.*—It is not the relative grades of different officers or employees, or the subordination of the one to the other, which determines when they are fellow-servants in relation to their common employer; but it is the nature of the duty intrusted to them.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

The plaintiff, Willis Smith, brought suit in the Circuit Court of Montgomery county against the Mobile and Montgomery Railway Company, to recover damages for an injury sustained while engaged in its service. He was employed as a fireman on an engine attached to a construction train of the defendant. On the second day of March, 1875, this train was sent from Montgomery, under the charge of one Mitchell, who was the engineer, to Letohatchie, thence to other stations down the road until it arrived at Greenville. There Major O'Brien, as supervisor of the road, assumed control of it, and continued the journey. In the meantime telegrams were sent by Col. G. Jordan, the chief engineer and superintendent of the road, directing O'Brien what to do. He replied at various stations, reporting the progress of the train. It was known that the rains had damaged the road, and the train was sent for the purpose of aiding in making repairs. From Sparta, the section-master, Price, telegraphed to another section-master (Johnson), to come to his assistance, and to bring all the hands he could get. This telegram was received by Johnson at Evergreen, who handed it to O'Brien. The train, having on it O'Brien, Johnson, Mason, a bridge-builder, and Mitchell, the engineer, set out in the direction of Sparta. It ran at a speed variously estimated at eight, ten, twelve and fifteen miles an hour. Passing over Johnson's, it had reached a part of Price's section, "when those on the engine suddenly discovered that the bed had been washed from under the rails. The damage to

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the road was of such a character that it was not perceived until the train had approached to a distance of one hundred and forty feet of it. It was impossible to stop the train at the rate of speed it was then running, before it ran into the wash." The plaintiff was "thrown violently between the engine and tender, and greatly mangled and injured. Had the speed of the train been only three or four miles an hour it could have been stopped before running into the wash, if there had been a brake on each car." There were seven cars, and no brake except on the tender of the engine. There was proof that O'Brien, Mitchell and Price were competent, prudent and careful men in their respective spheres of duty. There was evidence also, that "G. Jordan was an experienced, careful, prudent and competent man for the post of chief engineer and general superintendent;" and that "he had the power of appointment and removal of all those connected with the running of the road and the care and preservation of tracks and machinery."

The court, among other things, charged the jury: "That the defendants, a corporation, having employed Jordan as chief superintendent, and O'Brien as chief section-master of their railroad, to whom was delegated the power of supervision and the power of appointment and dismissal of persons employed under them, Jordan and O'Brien can not be considered for the purposes of this suit as servants, they were exercising the attributes of master, and not persons employed in the same general business. Any act of negligence committed by Jordan and O'Brien, or either of them, would be the act of the corporation and not the act of a fellow-servant, employed in the same general business."

To this part of the charge of the court, the defendant excepted.

The plaintiff requested the court to give the following charge, which he offered in writing, to-wit:

"That if the jury find, from the evidence, that by the negligence or want of care and prudence of Major O'Brien or Col. Jordan, the accident occurred, then, although the fault of the fellow-servant, Price, contributed to bring about the injury, the plaintiff would be entitled to recover, and the fault of the fellow-servant would not excuse the defendant under such circumstances." Which charge the court gave; and to the giving of this charge the defendant excepted.

The defendant then asked the court to give the following charges, which were in writing, to-wit:

"A. If the jury believe the evidence before them, on the

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subject of the nature of the employment of the plaintiff, Mitchell, O'Brien and Price by the defendants, that they were all servants of the corporation, that the plaintiff can not recover for any act of negligence either of omission or commission of either, or all, or any one or more of them, if it appears from the evidence that, in employing and retaining them in employment, the defendant took due and proper care to select and return prudent and competent men for the several employments in which they were respectively engaged.

"C. The natural import and meaning of the note written by Price to Johnson is, that the washes referred to were at or below Sparta, especially if the jury believe the evidence in connection with the duty of section-master, and that no one was seen or was on the track on Price's section above Sparta. And the receipt of this note justified O'Brien in concluding that the washes were below Sparta."

These charges the court refused to give; and to the refusal of each the defendant excepted.

SEMPLE & SEMPLE, for appellant.

THOMAS H. WATTS, JR., and WATTS & WATTS, for appellee.

MANNING, J.—This court recognizes the doctrine, that an employee who is injured in the course of his service, has recourse against his employer for damages, when the injury is caused by the fault or negligence of the employer, but not when it is caused by the fault or negligence of another of the employees, a fellow-servant,—unless, the employer be chargeable with blame, for having employed as such fellow-servant, a person incompetent or unfit for the business to which he is assigned.—*Walker v. Bolling*, 22 Ala. 294; *Perry v. Marsh*, 25 ib. 659. It is also held by this court, that in an action for damages in such a case, by an employee against his employer, "the *onus* of proving negligence is on the injured servant."—*Mobile & Ohio R. Co. v. Thomas* (42 Ala. 672.)

Without controverting these propositions, counsel for appellee insist that the injury to their client was caused by the negligence or want of due care, in this instance, of the superintendent of the railroad, who was the chief executive officer of the company, with the power to appoint and remove all persons acting under him, or of O'Brien, who was supervisor of about one-half of the road, whose duty it was to look after and keep in good repair, that part, and who had power to

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appoint and discharge the men that were to do the work under his direction. And it is contended that these persons were not "fellow-servants" of Smith, a brakeman, but supervisors who represented the company itself, and whose negligence is legally imputable to the company as a fault committed by it. This was in effect the substance of the charge which the circuit judge gave to the jury.

The subject of such a qualification of the general rule has been much discussed, and the decisions in regard to it outside of this State, are not harmonious. In *Walker v. Bolling*, *supra*, this court held that where there is a general manager or superintendent, who is invested by the common employer with the duty and authority of employing and dismissing the inferior agents and servants who are under him, the master is responsible for acts of negligence on the part of the superintendent, in failing to exercise due care and diligence in the employment of competent agents, or in not dismissing those who are proved to be incompetent.

In the present case, there has been no negligence in this particular. It is proved that Jordan the general superintendent, O'Brien the road-supervisor, Price a section-master to whom blame is ascribed, and Mitchell the engineer of the train, were all of them competent, prudent and experienced in the several duties to which they were respectively appointed. And these are all the persons, in any way chargeable with the mishap,—who were concerned in the service,—the examination and repair of a railroad damaged by recent flooding rains—in the course of which the disaster happened, of which appellee—(plaintiff in the Circuit Court,)—was the victim. Although O'Brien had authority to employ and dismiss the men who worked in repairing the road, Mitchell, the engineer and Smith a brakeman, of the train, did not come within that class. They, like O'Brien and Price, received their appointment from Jordan the general superintendent, and were removable by him. Is it not obvious then, that O'Brien is to be considered, within the meaning of the rule referred to, as a fellow-servant of Smith.

Sherman & Redfield, in their work on Negligence, (which appellant's counsel rely on for authority in support of their views) say: "A 'fellow-servant' within the meaning of the rule . . . is generally held to be any one serving the same master and under his control, whether equal, inferior or superior to the injured person, in his grade or standing. No extent of difference in their wages, social position, or work, affects the relation of servants of the same master, so

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long as they are employed in one general business. Thus a merchant's clerk, though (as is frequently the case) the equal of his employer in social position, is, in the eye of the law, a fellow-servant with the boy who sweeps out the store and makes the fires. So the engineer and brakeman of a train, the first and third engineers of a steamship, and the foreman and subordinate workmen in a shop, are all fellow-servants within the meaning of the rule.—(2nd ed. § 100.) And in the elaborately considered case of *The Mobile & Ohio Railroad Co. v. Thomas*, *supra*, this court, through WALKER, C. J., said: "The proposition which bases the liability on the superiority of grade of the negligent servant and the subordination to him of the injured servant, is, in our judgment, not founded in adequate reason. It can make no difference whether he is injured by the carelessness of another brakeman in some remote part of the train, or of the engineer, or conductor; nor can it make any difference, whether a fireman is injured by the negligence of the engineer who directs him, or of the machinist who is charged with fitting the engine for the road. . . . The employer's obligation to his servant in reference to his fellow-servants, must be the same in all the cases. . . . The master can do nothing more for the safety of himself or his family and property, than to be careful to select competent and fit servants. To inflict a penalty upon him for not doing more for his servant, is unreasonable. . . . After the employer has furnished competent and fit employees, the prevention of negligence on the part of any of them is certainly as much within the power of the others, as in that of the employer."—(Pages 723-4.)

Hence, according to the law as heretofore declared by this court, O'Brien, the road-supervisor, was, within the meaning of the rule, a fellow-servant of Smith, the brakeman; and in respect to O'Brien the circuit judge erred in his charge to the jury.

Was the charge erroneous also, in ruling that the company was liable for the negligence, if in the opinion of the jury there was any, on the part of Jordan, its superintendent and general manager? He was possessed of a much larger authority than O'Brien and more directly represented the company. But he was also in its service. If it authorized him to exercise the functions which properly belonged to the company itself, and which it, by its board of directors or president might perform,—as the selection and employment of the persons who were to do the work of building, equipping, keeping in repair and operating its railroad, and through

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want of care and due diligence, he should employ incompetent and unfit persons, whereby injury is done to others of its employees, the company would be liable therefor to them. He would be its substitute in the performance of such an office. So perhaps he would be when intrusted with the duty of procuring the materials for the work. But a railroad company, or the stockholders and directors thereof, are not supposed to be civil engineers, or to possess the scientific or mechanical skill, necessary to the building, repairing and operating of a railroad. The company is expected to employ—and must rely on—other persons who possess such skill, to do such work; while its duty further is, to procure and furnish the requisite and proper materials, and to pay the wages of the numerous employees. Was Jordan on this occasion, performing a function of the company, or a duty properly belonging to him as a skilled engineer in its service?

Extraordinary rains had caused great damage along the extensive tract of the railroad; the road-bed was in many places overflowed and in some washed away; and some of the bridges were supposed to have been carried off or undermined. Stopping the transportation trains along the line, Jordan sent out Mitchell with his locomotive and some platform cars, and with Smith as brakeman, to report to O'Brien, the supervisor, whom he instructed, by telegraph, to take the train and examine the road and cause it to be repaired. And it was while this service was being performed under the particular direction of O'Brien and the general instructions of Jordan, who from time to time communicated by telegraph from Montgomery, with O'Brien at different places along the line, and when they had come to a part of the road of which Price was section-master—and where he had failed to place any person or signal, as it was his duty to do, to give warning of the danger resulting from the condition of the road-bed that the accident happened by which the plaintiff, Smith, was unhappily injured. From the nature of the service, it was obvious to Smith, as well as to all those with him, that it was one of some danger. In the performance of it, Jordan was co-operating in his capacity of engineer and superintendent in the service of the company; and he seems to have been generally very vigilant and prudent in doing so. He was not exercising a function of the company, but performing a duty incumbent upon him as one of its skilled servants. He was indeed acting as completely and properly in the line of his employment, as O'Brien was in his, and this in a transaction, for the right performance of which the com-

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pany must employ and depend upon persons scientifically and practically trained and skilled for such work. It follows that he and Smith, being in the employment of the same person, and engaged in the same business of their common employer, they were within the meaning of the rule on the subject, fellow-servants. And since it is admitted that Jordan was, by his skill, experience and prudence a competent and fit person for the position of engineer and superintendent, and the company therefore acted with due care and diligence in employing him, it is not easy to see upon what just principle, it should be charged with an injury which by his negligence, if he was guilty of any, had happened to another of its employees.

It is natural that the poor man who is the sufferer by such a misadventure, should be the object of general sympathy. The sentiment is a generous one. And the law gives him recourse for damages against the individuals by whose tortious negligence, if there were any, the injury was caused. but the courts of the land have no just authority to impose the duty of making reparation for it, upon a defendant who has been guilty of no want of due care in the exercise of rights and powers with which the legislature has expressly invested it.

Some minds find it difficult to understand why an employer,—a railroad company, for instance,—should not be responsible to those in its employment for accidents befalling them, in the same cases and to the same extent, as to the persons not in its service. The different relations of the parties toward each other, are not kept in view. The customers of a railroad and the public for whom the company acts as carrier of persons and property, pay it to perform such services for them. Its employees, on the contrary, are paid by the company for the exertion of their skill and diligence in its behalf, for the very purpose of making repairs, completing equipment, preventing accidents and enabling it safely and efficiently to fulfil its engagements. The need of this skill and diligence implies imperfection without them, in the work upon which, or the service for which the employees are engaged; and they are paid according to the nature and exactions of the service. Generally, also, there must be co-operation with them on the part of other employees of the company in the work to be performed. For these reasons, it has been often ruled, that as between their employers and themselves, employees take the risk of any damage they may sustain from the perils incidental to the

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service in which they engage including those arising from the negligence of others engaged therein, unless they are chargeable upon the misconduct or negligence of the employer. This is now well settled law. Obviously, though such a rule is not applicable between the company and those not in its employment.

Let the judgment of the Circuit Court be reversed and the cause be remanded.

Bishop *et al.* v. Wood *et al.*

Bill of Review.

1. *When an injunction will be dissolved.*—The general rule of practice is that on the filing of an answer, an injunction may be dissolved on motion, if the equity of the bill is fully and completely denied; and whether the allegations of the bill be denied or not, an injunction may be dissolved, if the bill be wanting in equity.

2. *The right of amendment must be claimed.*—The right of amendment is secured by the statutes, but it is a right which must be claimed by the party entitled to it; and when there is an opportunity of claiming it, the chancellor errs only by a denial of it.

3. *It is error to dismiss a bill in vacation, when the complainant has not had an opportunity to amend the bill.*—When the demurrer to the bill, or a motion to dismiss it for want of equity, has not been heard; and the equity of the bill is drawn in question only incidentally, and the decree is rendered in vacation,—an absolute dismissal of the bill without affording the complainant an opportunity of amendment, is erroneous.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. HURIOSCO AUSTILL.

On the 10th day of May, 1871, Eliza Wood, a married woman, filed a bill of complaint by her next friend, in the Chancery Court of Butler county, against her husband, George W. Wood, Joseph Beasley, Stephen Bishop, and Matthew Bishop. The bill alleged that her husband, George W. Wood, purchased, many years ago, a certain tract or parcel of land, took the title to said land in his own name, and paid the purchase-money for it with money belonging to her statutory separate estate. Recently Wood had sold the same land to Stephen and Matthew Bishop, appellants in this case. The price agreed upon for the land was thirty-seven hundred dollars, one-half of which sum was paid, and the remainder became due at some time in the future.

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The bill also averred that one Beasley had sued her husband, the said Wood, in the Circuit Court of Butler county, to recover the amount due on a promissory note, and had garnished the said Bishops, purchasers of the land as aforesaid; and that the said "garnishment suit was then pending." The garnishees had answered the garnishment and had admitted an indebtedness to said George W. Wood of eighteen hundred and fifty dollars, payable in cotton at twenty cents per pound. The bill alleged that the note made by the said Stephen Bishop and Matthew Bishop, and given to the said George W. Wood for the balance of the purchase-money of the said land was in equity and justice a part of her statutory separate estate, and not liable for the debts of her husband, George W. Wood. The said bill concluded with a prayer for a writ of injunction against the said Beasley, restraining him from the prosecution of the said garnishment suit; that the note made by said Stephen and Matthew Bishop, and payable to said Wood, be decreed to be a part of her separate estate; that if it be necessary that all the deeds to said land, and the said promissory note "be corrected and reformed in accordance with the facts of the case," and for general relief.

Joseph Beasley, in his answer, denied the equity of the complainant's bill; and Stephen Bishop and Matthew Bishop admitted their indebtedness to the said George W. Wood, but alleged a payment or set-off of two hundred dollars, which ought to be credited on the said promissory note, and prayed for the protection of the court, and that their answer might "be considered and taken in the nature of a bill of interpleader, and that said Eliza Wood and said Joseph Beasley be in the Court of Chancery required to litigate their rights to said note and its proceeds."

The said George W. Wood was served with process, but filed no answer to the said bill, nor was a decree *pro confesso* taken against him.

Afterwards, during the pendency of the suits, Joseph Beasley, George W. Wood and his wife, Eliza Wood, agreed on the 26th day of February, 1873, to settle the matters in controversy between them. By the agreement it was stipulated that said Beasley should recover a judgment against Stephen Bishop and Matthew Bishop, the garnishees of Wood, for the sum of four hundred and fifty dollars; and "all other suits to be dismissed, each party paying his or her own costs."

On the 16th day of October, 1873, a decretal order was

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made directing the register to "take and state an account between complainant and defendants of what amount was the value of the cotton mentioned in the note made an exhibit to complainant's bill at the maturity of the same,—deducting therefrom the sum of four hundred and fifty dollars with interest thereon from the 21st day of May, 1873."

On the 17th day of October, 1873, the register reported, not the value of the cotton, but the amount of principal and interest due on the promissory note in money, after deducting therefrom four hundred and fifty dollars and interest thereon.

On the same day a final "decree was rendered by consent of all the parties in open court," that Eliza Wood, the complainant, should recover of said Stephen Bishop and Matthew Bishop the sum of eighteen hundred and sixty-two 16-100 dollars, together with the costs of suit.

A bill of review was filed by the said Stephen Bishop and Matthew Bishop, setting forth the foregoing facts, and alleging that "on the day the report of the register was read to the court, the same was confirmed by the consent of A. J. Perdue, as solicitor of the complainant; and a final decree rendered in favor of said Eliza Wood, vesting in her the right and title to the note made by complainants for said land, and decreeing that she recover from them the sum of eighteen hundred and sixty-two 16-100 dollars, together with costs—and the decree also recited that it was rendered by consent of all the parties in open court."

And the said complainants "aver that they did not employ or authorize any person for them to employ the said A. J. Perdue as their solicitor or attorney in said cause, or in any other cause. That his appearance for them in the Chancery Court was wholly unauthorized by them, or either of them, either directly or indirectly, and the consent of said Perdue for them, to said decree and reference, the confirmation of the register's report, and the rendition of the said final decree, was given without their, or either* of their, knowledge or consent thereto; nor have they, or either of them, in any manner, since, ratified the same; and that neither of them had any knowledge of such appearance and consent made for them by said Perdue until recently."

The complainants alleged, also, "that they were greatly wronged and injured by the proceedings in which said Perdue consented for them without authority, in this: that the bill of said Eliza Wood, to which complainants were made parties, nowhere claimed or prayed for any relief or decree against them, but only against George W. Wood and Joseph Beasley,

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yet the final decree is against them for money and costs, and is not in accordance with the allegations or prayer of said bill."

The complainants also averred that a credit of two hundred dollars, paid by them on the promissory note given to the said Wood, was not allowed on the reference by the register; that the report of the register did not conform to the order of reference, and that they were wrongfully taxed with costs of suit.

The bill prayed that it might be considered in the nature of a bill of review; and that "upon the hearing the orders and decrees and report of the register, made and entered at the October term, 1873, of this court in said cause of Eliza Wood against George W. Wood, Joseph Beasley and the complainants, might be reviewed, reversed and vacated, and the complainants restored to the position they occupied in relation to said bill before said orders and decrees were made. The bill prayed also for an "order suspending further proceedings on and under said final decree in said cause, and superseding the execution which has been issued thereon until the further orders of this court."

The chancellor allowed the bill of review to be filed, and granted an order suspending all further proceedings on the execution in the hands of the sheriff in favor of said Eliza Wood.

At the April term, 1875, of the court, "the cause was submitted, on motion by defendants, to dissolve the injunction; which motion it was agreed the chancellor might decide in vacation, within ninety days."

The court, on consideration, dissolved the injunction and dismissed the bill for want of equity.

HERBERT & BUELL, for appellants.—1. A judgment resting on an unauthorized appearance of an attorney may be set aside in equity.—Freeman on Judg. § 499, and authorities cited.

2. A decree *pro confesso* against appellant, on the bill of Eliza Wood, would not have supported the decree against them. The note was not described in the bill, nor does it show when it became due. It prays no relief whatever against appellants; nor do the allegations authorize a decree against them. The decree against them can not be reconciled with the primary rule of chancery pleading, that the *allegata* and *probata* must correspond.—1 Brick. Dig. 743, § 1538. Nor can complainant have relief for matters not alleged in his bill.—1 Brick. Dig. 743, § 1538. Nor can relief be

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granted under the general prayer, which is distinct from and independent of that general prayer.—1 Brick. Dig. p. 104, § 938.

3. To affect a dissolution of the injunction, the answer must deny every material allegation of the bill. But nearly every material allegation is admitted, directly or indirectly, by the respondents. The court has refused relief, and we asked that the decree be reversed, for the errors assigned; and at least that the bill be dismissed without prejudice.

GAMBLE & BOLLING, for appellees.—1. The injunction in this case ought to have been dissolved. An inspection of the record will show that every material allegation of the bill in which its equity rests was denied, and when this is the case, an injunction should be dissolved.—1 Brick. Dig. p. 677, § 548.

2. The court will, on motion, dissolve an injunction and dismiss the bill, if it is wanting in equity.—1 Brick. Dig. p. 677, § 546, *et. seq.*

3. The appellees deny the allegation that A. J. Perdue appeared for the appellants without their authority. And they can not deny the authority of an attorney who represents them.—5 Dana, 11; 7 Allen, 54; 2 Am. Lead. Cases, 633, 636, 637.

4. It is insisted that the register should have ascertained how many pounds of cotton, at twenty cents per pound, it would have taken to discharge the notes and interest, and then have found the value of the cotton at the time of the maturity of the note. This is clearly illegal. The note promised to pay George W. Wood eighteen hundred and fifty dollars, or its equivalent in cotton properly packed. This is only a stipulation in the note for the benefit of the appellants, and to avail themselves of it, they must show they delivered the cotton at the time the note matured.—1 Brick. Dig. p. 255, § 35, and authorities cited.

BRICKELL, C. J.—The bill is filed to review and reverse a decree rendered upon a former bill, for errors alleged to be apparent on its face, and also to impeach and set it aside for fraud. On presentation of the bill, the chancellor directed a suspension of the proceedings on the decree, until the further order of the court, on the complainants executing bond with surety in conformity to the statute.—Code of 1876, § 3842. The bond having been executed, answers were filed by the material defendants, who submitted a motion

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to dissolve the injunction, (by which we suppose was intended the vacation of the order of suspension,) on two grounds, viz: that the bill was without equity, and that its material allegations were fully denied by the answers. The motion was sustained, and the bill dismissed for want of equity. In the answer of the defendant having the real interest in the matters of controversy, a demurrer is incorporated assigning several distinct causes.

The general rule of practice under our statute, or rather of which the statute is declaratory, is that on the coming in of the answer, on motion, an injunction may be dissolved, if the equity of the bill is fully and completely denied; or whether there is, or not, a denial of the allegations of the bill, if it is wanting in equity, the injunction may be dissolved. Whether this rule is of any application to a restraining order entered by the chancellor on a bill of review, we do not propose now to decide. The rule of practice of force when the chancellor rendered the decree dismissing the bill, in effect prohibited a defendant, who had interposed a demurrer assailing the equity of the bill, from moving to dismiss until the cause was ready for final hearing.—Rule 71, R. C. p. 833; *Calhoun v. Powell*, 42 Ala. 645. The rule was intended and deemed probably as a sequence of another rule, requiring all demurrers whether incorporated in, or separate from the answer, to be disposed of on calling the cause, without awaiting a readiness for a hearing on the proofs. From the demurrer in an early stage of the cause, the defendant could obtain all the benefits of a motion to dismiss, and if the grounds on which it rests, could be obviated by amendment, the complainant would be apprised of its necessity, and a hearing on the merits expedited. The chancellor should not have dismissed the bill for want of equity. The dismissal was in vacation, without affording the complainants the opportunity of amendment. If there had been a hearing on demurrer, or on a direct motion to dismiss for want of equity, it would not have been the duty of the chancellor, on sustaining the one, or the other, to have retained the cause, and tendered the complainants the liberty of amendment. The right of amendment is secured by the statutes, but it is a right which must be claimed by the party entitled to it, and the chancellor when there is opportunity of claiming it, can be put in error only by a denial of it. But when there is not a hearing on demurrer to the bill, or on a motion to dismiss for want of equity, and the equity of the bill is drawn in question only incidentally, and the decree is rendered in

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vacation, it is error to dismiss absolutely, without affording the complainant the opportunity of amendment.

As a bill of review strictly, we do not think the bill can be maintained. The errors complained of, are errors of judgment revisible on error or appeal, but not by bill of review. *P. & M. Bank v. Dundas*, 10 Ala. 661; *McDougald v. Dougherty*, 39 Ala. 409. Of these errors, the complainants can not complain, if as the decree recites, it was rendered by their consent. But as a bill to impeach the decree for fraud, it can, and should have been sustained. Its averments are (and they are substantially admitted by the answers), that the solicitor appearing for the complainants, and consenting to the decree, had never been retained by them, and was wholly without authority in the premises. That of his appearance and consent to the decree, they were not informed until after the close of the term, at which the decree was rendered, and that he is not of ability to respond in damages to them for the injury which may result. The principle the case involves, and on which the equity of the bill may be rested, is thus stated in *Crafts v. Dexter*, 8 Ala. 770: "When by an unauthorized act of an officer of court, a judgment is improperly rendered against one, without his knowledge or consent, he may be relieved in chancery, though the plaintiff in the judgment was not privy to the act."—See, also, *Griggs v. Gear*, 3 Gilman, 2. Without comment on the facts stated, we proceed to inquire to what extent the complainants are aggrieved by the decree. It is not enough that there has been fraud or official misconduct, injury must have resulted from it. Fraud without damage, is not a cause of action at law, or a ground of relief in equity. It is only when the two meet and concur, that courts intervene.—*Overdeer & Aughinbaugh v. Wiley, Banks & Co.*, 30 Ala. 709.

The stipulation in the note, that it could be paid or discharged in cotton at twenty cents per pound, was for the benefit of the complainants. If they sought to avail themselves of it, they were bound to show an ability and willingness to deliver the cotton at the maturity of the note, of which the payee had notice, or the note became an absolute promise for the payment of the money expressed.—1 Brick. Dig. 255, § 35. The pendency of the garnishment at law, did not relieve them from the necessity of tendering payment in cotton at the maturity of the note, if they desired to avail themselves of the stipulation. They have no ground of complaint therefor, because by the decree they are charged with the payment of the money expressed in the note. The decree

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is not in that respect unjust, or in violation of law. But they have ground to complain that they were not allowed a credit for the two hundred dollars, they had paid on the note, and were charged with the payment of costs. Their relation to the former suit was that of mere stake-holders of a fund in controversy, and they were guilty of no default, or of such interference in the litigation as rendered them liable for costs. Thus far, the averments of the bill entitle the complainants to relief, and we think the chancellor erred in its dismissal.

Let the decree be reversed and the cause remanded.

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The Right of Amendment.

1. *A bill must be amended before the final decree.*—The right to amend bills of complaint and answers conferred by section 3790 of the Code of 1876, must be exercised before the final decree.

2. *A decree settling the equities, is final.*—A decree settling all the equities between the parties is final, and from it an appeal may be taken to the Supreme Court.

3. *The amendment can be made only in reference to evidence already taken.*—The right to amend the pleadings so as “to meet any state of the evidence which will authorize relief,” is confined to the evidence already taken.

4. *A final decree can not be amended at a subsequent term.*—When a final decree is free from errors, but the case is reversed and remanded, because without the consent of parties the chancellor confirmed the report of the register in vacation, the court, at a subsequent term, has no authority to amend the decree on the merits, or to allow an amendment which seeks to accomplish such a result.

APPEAL from the Chancery Court of Autauga.

Heard before the Hon. CHARLES TURNER.

The facts are contained in the opinion.

W. H. & W. T. NORTHINGTON, for appellant.—1. There is only one question presented by the record. It is the action of the chancellor refusing to allow the appellant to amend his answer. If the amendment proposed was material, and no final decree had been made, it is clear the chancellor erred in his refusal.—Code of 1876, § 3790.

2. A decree is not final which leaves unadjudicated any material question in litigation upon which the action of the court is invoked, and on which the court proceeds to act,

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but suspends action until a future day for any cause. Two of the most important matters involved in the case had been referred to the register to ascertain, and without the ascertainment of which no final decree could be made. This matter had been referred to the register and he had made his report, but no decree had been rendered thereon when the motion to amend was made. It was made, therefore, before the final decree, and should have been allowed.

DOSTER & ABNEY, for appellees.—1. In this case, the chancellor made two decrees; one settling the equities between the parties; and the other confirming, without the consent of the appellant, the report of the register in vacation. This court decided the chancellor only erred in the latter decree.

2. At a subsequent term, the appellant applied for leave to amend his answer. The proposed amendment was not signed by the appellant or his solicitors. The chancellor properly refused the amendment, because there had been a final decree settling all the equities of the bill. Nothing was to be done except the confirmation of the register's report and an order of sale of the mortgaged land.

3. Under any circumstances the chancellor ought not to grant an amendment unless the proof justifies it.—37 Ala. 169. In this case the equities are the same as if the amendment had been incorporated in the original bill. The amendment only denied the allegations in the second paragraph of the bill, which the proof fully sustained, and which had been so decreed by the chancellor. The opinion of Justice STONE, when this case was last before the court, accords with this view.

STONE, J.—Our statutes allowing amendments of pleadings are very liberal. Section 3790 of the Code of 1876, declares that “amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief; and amendments to answers must be allowed at any time before final decree, so as to set up any matter of defence; but such amendments to bills and answers must be allowed on such terms as the chancellor may impose, not extending beyond the payment of all the costs.”

Before the motion was made to amend the answer in this cause, the case had been fully prepared for final submission and decree on pleadings and evidence—it was submitted for

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final decree, and a decree was rendered by the chancellor, settling all the equities under the bill and cross-bill, and referring to the register the single inquiry of ascertaining and reporting the amounts due the several mortgagees. The register reported the sums due—there were some exceptions to his report, and the chancellor, in vacation and without the consent of Smith, complainant in the cross-bill, overruled the exceptions, and confirmed the report of the register. Each party appealed to this court, and assigned as error the several rulings of the Chancery Court. In the appeal of Mrs. Coleman the decree of the chancellor was in all things affirmed. In the appeal of Mr. Smith, the decree, so far as it affected the equity and merits of the controversy, was affirmed by this court. On the single question of the confirmation of the report of the register, we reversed and remanded the cause, on the sole ground that it was done in vacation, without the consent of the parties. In all other respects we concurred with the chancellor, and affirmed the principles settled by his decree.

When the case returned to the Chancery Court, it stood in that court in all respects as it had stood, at and up to the very moment when the chancellor erroneously confirmed the report of the register. The appeal to this court, and reversal of the order of confirmation, had no other effect than to remit the cause to the condition it was in, when the chancellor, by mistake, and without authority, assumed to confirm the report in vacation. The reversal of the order of confirmation did not in the least impair the decrees theretofore rightly rendered, or confer on the chancellor any other authority or jurisdiction in the premises, than he had immediately before he pronounced the order of confirmation. It is settled in this court, by numerous decisions, that when a decree of the Chancery Court settles the equities between the parties, and leaves nothing to be determined but the taking, and stating an account, such decree is final; and an appeal to this court may be prosecuted therefrom, without waiting for the report of the register.—See *Bank of Mobile v. Hall*, 6 Ala. 141; *Garner v. Prewitt*, 32 Ala. 13.

So, in *Ex parte Creswell*, during the present term, a decree had been rendered by the chancellor, settling all the equities, and vesting title to the lands in controversy in complainant; and under a decretal order of the chancellor, the register had made a report of the amount of rents due, to which no exceptions were filed. At a subsequent term, the chancellor reconsidered his former ruling, and dismissed the bill for

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want of equity. We reversed his later decision, and, by *mandamus*, directed the decree of dismissal to be vacated and set aside, because, by his decree on the merits, the right to hear and determine had passed from the chancellor's jurisdiction, and he had no longer authority over the cause, save to consummate and execute his own decree.

In section 3790 of the Code, *supra*, the compulsory duty resting on the chancellor to allow amendments, is limited to applications therefor made "before final decree." In the present case the application was not made until *after* final decree. The case is not brought within the statute. Whether or not, after such decree as this, the chancellor may allow an amendment in the nature of a bill of review, to meet the demands of a hard case, we need not now inquire; for if he have such power, it is evidently one of discretion, which is not the subject of review. On principles of public policy, such discretion, if the power exists, should not be called into active exercise, except in cases of unquestioned merit, and with great caution and circumspection.

Another view of this question we feel it our duty to notice. It is not every species of amendment the statute was intended to provide for. Amendments in mistakes of names constitute the first provision. The second is, "to meet any state of evidence which will authorize relief." What is meant by *state of evidence*? Evidently not some possible state of proof, afterwards to be made. That would let in all the mischiefs which would result from unlimited license to re-examine witnesses, or to supply defects of proof, discovered after publication. It is a *state of evidence* already taken, authorizing relief, which the statute was designed to provide for. Under it, discrepancies between the allegations and proof may be remedied, and possibly some other defects healed. When such amendment is permitted, it, *per se*, gives no right to the party in whose favor it is allowed to claim a continuance, or to take further testimony. It is only when the adverse party claims it, that a continuance is granted as matter of right; and then, "both parties have the right to take additional testimony."

The amendment offered in the present case was not to meet any state of evidence already taken. The proof in this record does not establish the truth of the averments contained in the amendment. If allowed, it could have had no influence in the trial of the cause, without other testimony. The amendment is not of the class which falls within section 1790, Code of 1876.—See *King v. Avery*, 37 Ala. 169.

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In any view we can take of this record, the appellant fails to make a case, in which he can demand, as matter of right, that his amendment should have been allowed.

The decree of the chancellor is affirmed.

Gafford v. Proskauer & Co.

Set-off.

1. *Unliquidated damages can not be set off against a certain debt, in equity.* Against a clear and certain debt, a court of equity will not set off damages which are strictly unliquidated.

2. *A set-off, available at law, may be used in equity against a mortgagee.* When the mortgagee seeks a foreclosure in equity, the mortgagor may set off any debt or demand against the mortgagee, which would be the proper subject of set-off, if the mortgagee were suing at law for the mortgage debt.

3. *Damages sustained by disobedience of instructions in the sale of cotton are recoverable.*—Damages which the mortgagor has sustained by the mortgagee's violation of instructions to postpone the sale of his cotton, are under our statute a proper subject of set-off; and the measure of damages is the difference between the sum realized on the unauthorized sale, and the sum which would have been realized if the instructions had been obeyed.

4. *The mere right of set-off will not authorize a resort to equity.*—A mortgagor can not resort to equity for relief against the mortgagee, or mortgage debt, merely on the ground that he has a demand against the mortgagee which may be a proper subject of set-off.

5. *An agreement may be void for uncertainty.*—An agreement for the advancement of money which contains no specified sum, or any facts from which the sum may be ascertained, is void for uncertainty.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. HURIOSCO AUSTILL.

The facts are stated in the opinion.

HERBERT & BUELL, and WATTS & SONS, for appellant.

1. The bill had equity in it. The object of the bill was to enjoin the defendants from foreclosing a mortgage alleged to have been paid and discharged.—37 Ala. 354; 14 Ala. 476. The damages resulting from a breach of contract may be ascertained in a court of equity. The mortgage and the contract were made on the same day, and the different papers and verbal agreement constitute part and parcel of a single contract.—1 Brick. Dig. p. 639, § 5. For wherever two or more papers are executed on the same day, and refer to each other, they are regarded as the same transaction both in law and equity.

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2. These accounts were between merchant and merchant, and were complicated; there were various credits and debts on each side. The court having obtained jurisdiction on any one of several grounds will proceed to do complete justice between the parties. If the amount paid by Gafford on the mortgage debt, coupled with the damages to which he was entitled from the mortgagee satisfied the mortgage debt, it would be oppressive and unjust to permit the mortgagee to proceed and sell the land under the mortgage.

WHITEHEAD & LANE, and ANDERSON & BOND, for appellees.—1. The prime object of the bill is recovery of damages for a breach of contract. The injunction is merely secondary to this. Damages are recoverable at law only except when they are incidental to a suit in equity.—28 Ala. 163; 2 Story Eq. 794; 25 Maine Rep. 531. The court of equity will not entertain a suit for damages when they constitute the sole object of the bill, and there is a perfect remedy at law.—8 Ala. 748; 13 Ves. 131; 2 Cox, 209; 7 Cranch, 69. In *Harrison v. Duramus*, 33 Ala., precisely the same question is presented.

2. There is nothing peculiarly equitable in the character of this set-off. There is no allegation of the insolvency or inability of Proskauer to respond at law for any damages sustained. This is a case, from its nature the chancellor can not determine. It is, in a most peculiar manner outside of his jurisdiction.—33 Ala. 446, and cases cited. The construction of the statute of set-off is the same in equity as at law. 9 Ala. 301. And even in case of insolvency the mere fact alone of mutual debts would not sustain the jurisdiction. *Waterman on Set-off*, § 368, *et seq.*; 2 Story Eq. §§ 1435–6 and 7.

3. The negligent or unlawful conduct of an agent in another and distinct matter can not be allowed as a set-off at law against an action on a note or bill of exchange.—19 Miss. 125; 15 Miss. 424; 16 Miss. 494; 1 Taunt. 137; 42 Maine, 192; 2 Miles, 399; *Waterman on Set-off*, §§ 298–9.

4. Evidence shows Proskauer made advances of money on the faith of the cotton, and had a right to sell. Gafford had no right to revoke the authority to sell, without at least making good the advances.—14 Pet. 479; 2 Pet. 40; 12 N. H. 239; 3 Comst. 78.

BRICKELL, C. J.—The bill substantially alleges, that the appellee is proceeding to execute a power of sale, con-

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tained in a mortgage executed to him by the appellant. The execution of the power it is alleged is inequitable, because the appellant, for damages resulting from a breach of an agreement, by which the appellee was to advance the appellant moneys to carry on his mercantile business, and to purchase cotton during the cotton season of 1873 and 1874; and was liable also for damages, for making sales contrary to instructions, of cotton shipped him for sale; and these damages, it is averred, exceed the amount of the mortgage debt. On final hearing, the temporary injunction was dissolved, and the bill dismissed.

We concur with the chancellor, that the bill is without equity. If we assume, that it is shown by the evidence, that the appellee agreed to advance the appellant moneys to carry on his mercantile business, and to buy cotton, during the cotton season of 1873-4, it would be difficult to ascertain any consideration for the agreement, or its extent, or how far the parties intended that it should extend, with any degree of certainty. It was not agreed that any particular sum should be advanced, nor are there facts stated, from which the sum may be ascertained. Agreements are sometimes so indefinite and uncertain, as to be wholly void. Thus, in the case of *Erwin & Williams v. Erwin*, 25 Ala. 236, an agreement that in consideration, of plaintiffs purchasing of the defendants, a store-house, and a stock of dry goods, the defendant would assist them, by indorsing their paper, and advancing them money to carry on the business, was held void. And in *Adams v. Adams*, 26 Ala. 272, a promise by a father on valuable consideration, that he would give a daughter, "a full share of his property, which was then and there worth twenty-five thousand dollars," was declared void for uncertainty. The agreement now insisted on, if made, falls within the principle of these authorities.

Independent of this consideration, the damages resulting from its breach, are unliquidated. There is no legal standard by which they can be measured accurately and ascertained. A court of equity will not set-off against a clear and certain debt, damages which are strictly unliquidated, springing out of transactions not connected with the debt.—*Livingston v. Livingston*, 4 Johns. Ch. 293; *Pulliam v. Owen*, 25 Ala. 492; *Jennings v. Webster*, 8 Paige, 502; *Jordan v. Jordan* 12 Geo. 77.

A mortgagor may, if the mortgagee is seeking a foreclosure in equity, set-off any debt, or demand, he may hold against the mortgagee, which would be the proper subject of set-off,

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if the mortgagee was suing at law for the recovery of the mortgage debt.—*Chapman v. Robertson*, 6 Paige, 627; *Irving v. DeKay*, 10 Paige, 319. But if it becomes necessary for the mortgagor, to resort to equity for relief upon the ground, that he has a proper set-off, against the mortgagee, or the mortgage debt, he must show some other fact, than the mere existence of a demand which is the proper subject of set-off. *T. C. & D. R. R. Co. v. Rhodes*, 8 Ala. 206; *Cave v. Webb*, 22 Ala. 583. The damages the complainant may have sustained from the defendant's violation of his instructions to postpone the sale of his cotton, under our statute are the subject of set-off. The difference between the sum realized on the unauthorized sale, and the sum which would have been realized, if the instructions had been obeyed, is the measure of damage. No ground of equitable relief in respect to this demand is shown. The remedy at law is adequate, the party liable is solvent, and there has been no agreement that it should be discounted from the mortgage debt.

The suggestion that the law would apply these set-offs to the payment of the mortgage debt, can not be supported. There is a very broad distinction between a payment, and a set-off, and distinct demands are never in the absence of an agreement between the parties applied as payments of each other.—*Green v. Storm*, 3 Sandf. Ch. 305.

The decree of the chancellor is affirmed.

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Detinue.

1. *A charge, which leaves a fact, growing out of a contract to be ascertained by the jury is not erroneous.*—When from the terms of a contract for the delivery of timber, the court can construe a “stipulation to give a lien and mortgage on timber” as fast as gotten out, “to embrace” timber in existence when the contract was made, as well as timber to be manufactured afterwards, a charge which leaves this fact to be ascertained by the jury from the evidence, is not erroneous.

APPEAL from the Circuit Court of Escambia.

Tried before the Hon. JOHN K. HENRY.

C. L. Wiggins and Neil McMillan, partners under the firm name of Wiggins & McMillan, commenced an action of

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detinue in the Circuit Court of Escambia county, against Henry Morningstar, to recover "twenty-six pieces of square pine timber." The defendant pleaded the general issue.

On the trial, the plaintiffs offered in evidence the following instrument, viz:

"This agreement, made and entered into this the 27th day of November, 1873, by and between Joseph W. Kelly, of Escambia county, State of Alabama, and Wiggins & McMillan, of Pollard, Alabama, witnesseth, that the said Joseph W. Kelly, does hereby sell, and agree to deliver, to the said Wiggins & McMillan, or their authorized agent, at Ferry Pass, in Escambia county, State of Florida, during the ensuing season, the following pitch-pine timber, to say, (100) one hundred pieces at the following scale of prices, to-wit: Thirteen cents per cubic foot for timber averaging (80) eighty cubic feet, and classing B1, good, and half cent less for every five feet decrease in average, and with an advance of half a cent for each five feet increase in the average. In case any timber is delivered classing under "B one," it is not to be included in this scale of prices, but Wiggins & McMillan are to have the option of taking it at the market price; and Wiggins & McMillan hereby agree to advance to the said Joseph W. Kelly, from time to time, such reasonable sums as may be needed to manufacture and haul said timber, and raft it to the market, for which advances he is to pay the usual interest and commissions. Any balance due upon timber delivered after payment of the advances is to be settled in cash, and Joseph W. Kelly hereby gives Wiggins & McMillan a lien and mortgage as security for such advances upon all timber as fast as gotten out, wherever it may be, and do hereby authorize Wiggins & McMillan, or their agent, in case of any accident to the said Joseph W. Kelly, or whenever they may think it necessary for their security, to take possession of and brand said timber wherever it may be, and get it to market, leaving the final settlement of accounts with Wiggins & McMillan, or their representatives, until the timber reaches the market. It is also agreed and understood that in case of any hidden defect being found in said timber after the delivery of, and settlement for the same, the said Joseph W. Kelly guarantees to make good any damage caused by said defect to Wiggins & McMillan, and the said Joseph W. Kelly hereby agrees not to contract with any other party for the sale or delivery of timber until the fulfilment of this contract, and acknowl-

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edges the receipt of (\$50) fifty dollars as an advance on this contract.

"In witness whereof the parties to the contract have hereunto set their hands and seals, the day and date above writtten.

"WIGGINS & McMILLAN, [L. S.]

"J. W. KELLY. [L. S.]

"In the presence of M. McMillan."

The plaintiffs also introduced evidence tending to show that under the contract they had advanced to the said Kelly about seven hundred and forty-two dollars, and that they had received under the contract only "seventy-four sticks of timber."

The defendant introduced as a witness the said Joseph Kelly, who testified that at the time of making the contract with Wiggins & McMillan, "he had one hundred and ten good sticks of timber which was old; that this was not understood by himself to be included in the contract; but the contract referred, or applied, only to timber manufactured after its execution; and that the twenty-six sticks of timber in litigation was a part of the one hundred and ten sticks in existence when the contract was made."

The defendant then introduced the following instrument of writing, viz.:

"This is to certify that I do sell and transfer all my right, title and claim to one hundred and ten or fifteen pieces of hewn timber in Little Escambia creek, between Wolf Log and Gilmore landings, on Little Escambia creek, to Henry Morningstar, for which he is to pay me four hundred dollars, in money, in thirty days from date of this paper; and also four hundred and fifty dollars in merchandise, at different times, as he may call for them—the amount in full is eight hundred and fifty dollars. Also, in case of the death of said H. Morningstar, the said Mr. Joseph Kelly shall draw the said amount from the estate of the said H. Morningstar without administration. Pollard, Alabama, April 26th, 1874.

"H. MORNINGSTAR, [L. S.]

"J. W. KELLY, [L. S.]"

The foregoing contract was recorded in the office of judge of probate of Escambia county, on the eighth day of May, 1874. "Here the defendant closed."

The plaintiffs then offered evidence tending to show that at the time of the execution of the contract the said Kelly "stated that he had already gotten out one hundred and ten sticks of timber, and that this was the inducement to make the contract; and Kelly said to Wiggins that they need not

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be afraid to trust him, as he had timber enough out to fill the contract."

Among other matters, the court charged the jury "that the second part of the contract contained a stipulation to give a lien and mortgage on timber "as fast as gotten out."

"That the meaning of this expression was a doubtful one, and that parol testimony had been admitted to explain it; that if the jury were satisfied from all of the evidence, both oral and written, that it was the intention of the parties to the contract that this expression should include timber in existence that had been manufactured when the contract was made, then this contract, or instrument, with such proof, would give the plaintiff such a title to the timber sued for, as would entitle them to recover in this action.

"That the third division of the contract contained a stipulation by which Joseph Kelly undertook to bind himself not to sell or contract for the sale of any timber; that this included timber already manufactured at the time that the contract was made, as well as timber to be manufactured afterwards, and that Joseph Kelly could not sell any timber to any other person so long as the undertaking with Wiggins & McMillan was not fulfilled, without a violation of his contract; and that if before this he undertook to sell any timber that he may have had when said contract was made, or that he may have manufactured afterwards, such sale would be void, and no title would pass thereby against the plaintiffs who held under this contract, which had been recorded.

"That it was contended that the plaintiffs had waived their liens under the mortgage, if they had any, to the timber sued for. But that if the proof showed that the said Kelly had offered to sell the plaintiff one hundred and ten sticks of timber, lying in Escambia river, and the plaintiffs refused to buy it, this of itself would be no waiver of their lien, if they had any, unless the proof showed that the said Kelly had tendered them, the plaintiffs, the exact number of sticks of timber to which they were entitled, at the place at which the timber was to be delivered by the contract; and to determine this the jury must look to all the evidence in the case."

And to this charge the defendant excepted.

J. M. WHITEHEAD, for appellant.

HERRERT & BUELL, for appellees.

MANNING, J.—According to the instrument executed

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November 27th, 1873, out of which this contest arose, in the first place, Kelly, one of the parties to it, "sells and agrees to deliver to the said Wiggins and McMillan, or their authorized agent, at Ferry Pass, in Escambia county, State of Florida, during the ensuing season, the following pitch-pine timber, to say (100) one hundred pieces at the following scale of prices;" &c., the parties further agreeing, that "in case any timber is delivered classing under B one, it is not to be included in the scale of prices, but Wiggins & McMillan are to have the option of taking it at the market price, and Wiggins & McMillan agreed to advance to Kelly, "from time to time such reasonable sums as may be needed to manufacture and haul said timber and raft it to the market," he to pay the usual interest and commissions. In the second place, Kelly "gives a lien and mortgage as security for such advances upon all timber as fast as gotten out wherever it may be," and authorizes Wiggins & McMillan, "whenever they may think it necessary for their security, to take possession of and brand said timber, wherever it may be, and get it to market, leaving the final settlement of accounts with Wiggins & McMillan or their representatives, until the timber reaches market;" and Kelly further agrees "not to contract with any other party, for the sale or delivery of timber until the fulfilment of this contract and acknowledges the receipt of \$50, fifty dollars, as an advance" thereon.

In construing this instrument so as to give due effect to every part, and properly to enforce it as a whole, we regard this last stipulation, which prohibits the sale or delivery of timber by Kelly to any one else, unless this contract is fulfilled, as supplemental to the preceding clause, which creates a lien and mortgage, and as designed to prevent this security from being in any way impaired. Thus viewed the subsequent clause removes all the uncertainty which may be supposed to be produced in the former, by the expression "as fast as gotten out,"—and shows that the mortgage extended to any timber which Kelly should have from the time of the execution of the instrument until the fulfilment of his contract, and therefore embraced the timber sued for, which he had transferred to appellant. The Circuit Judge might have so instructed the jury in his charge to them, without reference to the parol evidence on the subject. Therefore, in the instruction excepted to, he committed no error to the prejudice of appellant.

Let the judgment be affirmed.

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The South and North Alabama Railroad Company v. Sullivan, Adm'r.

Action for Damages.

1. *The act of February 5th, 1872, explained.*—The act to prevent homicides, approved February 5th, 1872, was intended not merely to give compensation for the lost earnings of the slain by the wrongful act or omission of another, but is also punitive in its purpose; and its provisions apply as well to corporations as to natural persons.

2. *The damages recovered under that act become assets of the estate.*—The compensation given by the act does not go to the husband, wife, or child of the deceased, as such, but becomes assets of the estate, not subject to the payment of debts, and must be distributed as the personalty of an intestate is now distributed.

3. *The personal representative of the decedent must sue.*—The damages given must be recovered by the personal representative of the decedent; and when the person killed was a married woman, the law does not require the suit to be brought by the husband.

4. *A release given by the husband is no defence to a suit brought by the personal representative.*—A release given by the husband to a corporation by whose wrongful act or omission the wife was killed, is no bar, or defence to an action brought by her representative to recover damages.

5. *A general exception to a general charge is defective, unless the entire charge is erroneous.*—A general exception reserved to the general charge given by the court, which asserts several distinct propositions, some of which are correct, is defective, and does not require the appellate court to sift the charge with the view of ascertaining whether or not, some part of it is erroneous.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. W. B. Wood.

Jerry Sullivan, the administrator of Mary Hughes, brought suit to the fall term 1875, of the Circuit Court of Jefferson county, against the South and North Alabama Railroad Company, to recover damages for the death of Mary Hughes, caused by an act of the corporation. The defendant demurred to the complaint on the grounds—*first*, that the complaint shows that Mary Hughes was a married woman; and *second*, that the complaint does not aver, that at the time of her death the said Mary Hughes had an income. The demurrer was overruled. The defendant then pleaded—*first*, “not guilty,” with leave to give in evidence any special matter which could be pleaded by any special plea; *second*, Payment; *third*, that “the said Mary Hughes was, at the

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time she came to her death, a married woman, the wife of James Hughes;" *fourth*, "the said defendant, for a further plea in this behalf, says that after the committing of said grievance alleged in said complaint, and before the commencement of this suit, to-wit, on the ninth day of January, 1873, one James Hughes, who was, at the time of committing the said grievance, the husband of the said Mary Hughes, by his certain writing of release, sealed with his seal, and now shown to the said court here, the date whereof is a certain day and year therein mentioned, to-wit, the day and year last aforesaid, did for himself, his heirs, executors and administrators, release and forever discharge the said defendant from all manner of action or actions, cause or causes of action, suits, claims and demands whatsoever, in law or equity, which he, the said James Hughes, then had, or which he, the said James Hughes, his heirs, executors or administrators should or might, at any time or times thereafter, have, claim, allege or demand against said defendant by way of damage, either general or special, actual or consequential, for only reason of grievance alleged in said complaint as aforesaid, as by the said deed or writing of release reference thereunto had will fully appear, and this the said defendant is ready to verify; wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it."

To this plea the plaintiff demurred, and the demurrer was sustained by the court.

On the trial, the plaintiff introduced as a witness W. J. Thompson, who testified that "he saw the deceased coming up the said track, meeting the switch engine or locomotive of the said railroad company, which was moving down said track at the rate of five or six miles per hour, the said engine having attached to it a stock car by the cow-catcher. The witness saw the deceased get off the track of the South and North Railroad, out of the way of the said locomotive, and step on the track of the Alabama and Chattanooga Railroad, and walk on the same with an umbrella stretched over her head, a small shawl on her shoulders, and a large, dark shawl pulled over her head. The said switch engine passed on down said road about fifty yards further and switched to the said track of the Alabama and Chattanooga Railroad, and push up said stock car on said Alabama and Chattanooga track at about the same rate of speed, and when it came within about fifteen feet of the deceased, some one exclaimed: "Look at that woman!" and the witness threw up his hand and hollowed, in order to give warning to the engineer of

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the danger. He saw, or thought he saw, some one whom he took to be the engineer, move in the cab of the engine, and it seemed to him that the locomotive slackened its speed, but it soon overtook the woman, ran over her, producing instant death, and passed twelve feet beyond where she was first struck. The witness can not say whether or not the said engineer was ringing the bell, but recollects hearing some bells about that time, or just before that time, but can't say it was the bell of that engine. It was drizzling rain at the time, and the track was wet, the ground was muddy, and the track on which the deceased was walking afforded a dryer path than the adjacent ground; that persons commonly walked on said track in passing up and down the road, and never heard of the company forbidding any one doing so. The deceased at the time had a basket on her arm and a little book (like a memorandum book) in her hand, and was coming from the direction of her house towards town. A great deal of switching was going on at this time by said railroad company. And all this occurred within the corporate limits of the city of Birmingham, and near the machine shops of the said company, and about one hundred yards from the Birmingham depot. The deceased, at the time she was killed, was a married woman, the wife of — Hughes."

Other evidence corroborated the testimony of this witness, and none materially conflicted with it. It was also shown that the defendant had the right to use the track of the Alabama and Chattanooga Railroad Company.

The court then gave the following charges, viz.:

1. "The recent decision of the Supreme Court of Maryland, in a case very similar to the present in many circumstances, seems to me to be the proper rule on the subject of contributory and comparative negligence, and I adopt their decision, and charge that when a person walking on a railroad track is run over and killed by an engine belonging to a railroad company, the company is responsible in damages for such killing, though the deceased was guilty of the want of ordinary care and precaution in so walking on the track; provided it appears that the accident would not have occurred if the agents of the railroad company had used in running the engine which occasioned the killing, ordinary prudence and care in giving reasonable and usual signals in its approach, and in keeping a reasonable lookout.

2. "But now, if you find that the woman was guilty of negligence in walking on the railroad track, and not exercising the proper diligence by using her own means, such as

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sight and hearing, of avoiding danger, and this negligence on her part contributed to her death, whilst the defendants were using ordinary care and prudence in running the train, then the plaintiff can not recover.

“But if you find that there was a lack of prudence on the part of both, then you may inquire as to comparative negligence of the parties, and if you find that although the want of care and prudence may be imputed to the woman in walking on the track, yet the railroad is not excused if the agents of the company fail to use ordinary prudence and care in running the engine, by giving the usual signals and keeping a reasonable lookout to prevent accidents to persons on the track; and the plaintiff may recover such damages as the jury may assess, not exceeding the amount claimed.”

To the general charges given by the court, the defendant excepted. And then asked in writing several charges, which the court refused to give. And the defendant excepted severally to the refusal of each of the said charges.

RICE, JONES & WILEY, and HEWITT & WALKER, for appellant.—1. When the right asserted by the plaintiff, if it exists at all, is given by statute, it must be asserted within the time, and in the mode prescribed by the statute; and the complaint is bad if it fails to show upon its face such conformity to the statute.—13 Ala. 366; 29 Ala. 700; 21 Ala. 501. A statute applicable in its terms to particular actions, can not be applied by construction to other actions standing on the same reason.—1 Brock. Rep. 523, 524; *Martin v. McRee*, 30 Ala. 116. The court is not called on to say what law the legislature should have made, but what law it did make as to the case to be decided.

2. The complaint contains no substantial cause of action; and therefore can not authorize or support the judgment for the plaintiff, even though not objected to on that ground in the court below.—40 Ala. 142. A married woman, if not killed by the wrongful act of a railroad company, but merely injured, could not maintain an action for the injury. Hence her administrator can not maintain an action for such injury when it produces her death. Nor does the statute entitle the administrator of a person who has no income, to sue the corporation. As the complaint alleges no income, the court must presume the deceased had none.

3. The demurrer to the complaint should have been sustained. To make the complaint sufficient, it was essential that it should aver with reasonable certainty that the suit

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was commenced within one year from the death of the plaintiff's intestate. In this particular the complaint is defective.

4. The act to prevent homicides, approved February 5th, 1872, is unconstitutional and void, because the subject is not clearly expressed in its title.—Section 2, of art. 4, of the Constitution of the State. It is very unlike the title of the New York statute referred to by the appellee. That is an “act requiring compensation for causing the death by wrongful act, neglect or default.” The act in question is unconstitutional, because it revises and amends sections 22, 97 and 2298 of the Revised Code, and does not contain the sections revised and amended.—Const. *supra*. But whether the act be constitutional or not, its operation is confined to natural persons, and does not embrace corporations. All its provisions show this. Its second section is conclusive. That section provides that the action shall survive against the personal representative of the wrong-doer. Corporations have no personal representatives. Sections 2297 and 2298, of the Revised Code, do not embrace corporations, as is conclusively shown by section 2300 of the Code. This is unrepealed, and to be completely understood, must be read with sections 2297 and 2298 preceding it.

In the construction of this statute, section one of the Revised Code can have no application; it is restricted in its application to the statutes embraced in the Code; but even then, “the section declared that the word person, when used in it, includes a corporation, as well as a natural person; but this must be understood only of such provisions as will allow the signification to be given without violating their evident sense and meaning.”—26 Ala. 498, 503.

5. The release given by the husband to the defendant, is a good and complete defence to this cause of action. And the demurrer to it interposed by the plaintiff, ought not to have been sustained. The husband, upon a distribution of the amount recovered by this action, would be entitled to one-half of it, and this the husband, for a consideration, could certainly have released to the appellant.

The first and second charges ought not to have been given by the court below. They recognize the doctrine of comparative negligence, which has not only been repudiated by the courts of a number of States—25 Ind. 185; 28 ib. 287; 33 ib. 335; 39 N. Y. 358; 16 Ill. 198; 22 ib. 264; 29 Ill. 447—but also by our own Supreme Court in the well considered case of *Hanlon pro ami v. Government Street Railroad Company*, (in manuscript). The case of *Bellefontaine Railway*

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Co. v. Hunter, 33 Ind. 335, conclusively shows the rulings of the court below are wrong, and especially in the matter of contributory negligence of the married woman who was killed.

An action for the "instantaneous killing" of a married woman, not shown to be separated from her husband, through the wrongful act, omission or culpable negligence of another in Alabama, can not be maintained by her personal representative.—41 N. Y. Rep. 294, 303; 9 Cush. 108; 12 How. N. Y. Reps. 323.

Careful examination of the foregoing cases renders the conclusion inevitable, that no law of this State gives an action to the personal representative of such married woman against any person (natural or artificial) for wrongfully causing her instantaneous death.

SOMERVILLE & MCEACHIN, and S. A. M. WOOD, and E. L. CLARKSON, and JOHN W. TERRY, for appellees.—1. It is insisted that the act under which this suit is brought is unconstitutional, because it reverses and amends sections 2297 and 2298 of the Revised Code, and does not contain those sections. We submit that this act is an independent law, not purporting to be amendatory or revisory in its character, and is in itself complete, intelligible, and original in form, and therefore is not within either the letter or spirit of this constitutional requirement.—47 Ala. 667, 675; 48 Ala. 579, 583-84; 40 Ala. 77, 100; Cooley Const. Lim. 150, 151.

2. This act is a substantial embodiment of the provisions of the English statute usually called Lord Campbell's Act. The purpose of the act is clearly shown by its title.—2 Redf. on Railw. p. 207, § 179; 14 N. Y. 317. The word "person" includes a corporation as well as a natural person.—Code, § 1. In all cases where persons are mentioned in a statute, corporations are included if they fall within the general reason and design of the statute.—Ang. & Ames Corp. §§ 6, 193, 441; 15 Johns. 357; 26 Ala. 503.

3. The demurrer to the plea of release was properly sustained. There are two separate and distinct actions which may be brought for a personal injury to a married woman, not resulting in death. One is for the loss of the service and society of the wife, and must be brought in the name of the husband alone. The other is for the personal injury and sufferings of the wife, in which the husband and wife must join as parties.—21 Barb. 245; 2 Redf. on Railw. pp. 211, 212, 213, § 181; 8 Gray, 45. The act of 1871-2 gives the right

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of action to the personal representative, and creates a new right of action. Such seems to be the construction of Lord Campbell's Act, by a high authority.—2 Redf. on Railw. pp. 207–8, note 3. The release carries the right of action of the husband for loss of services and society of the wife, but can not effect the right of action given by the statute to the personal representative of the party killed.—Acts 1871–2, p. 83.

4. The fact that the person killed was a married woman avails nothing as a defence to the action. The statute clearly includes such a case in its spirit and letter.—2 Redf. on Railroads, 213, § 180. In a case from Wisconsin, the Supreme Court of the United States entertained no doubt as to the right of the administrator of a deceased wife to recover for such an injury.—13 Wall. 270.

5. There is no force in the objection embodied in the second ground of demurrer, that the deceased had no income at the time of her death. If this action had been brought under sections 2297, 2298 of the Revised Code, it would have been pertinent, because the income of the deceased would then have been a leading factor in the measure of damages; but this suit is based on the act of 1872, and the question of income is irrelevant.—5 Wall. 90, 105; 23 Penn. 530.

6. The charges given and refused by the court below, in regard to the doctrine of *contributory and comparative* negligence are sustained by the opinions in 34 N. Y. 622; 36 Md. 366; 50 Mo. 461 (11 Am. Rep. 420); 2 Redfield on Railw. p. 192, § 177; Sanders on Neg. p. 53, § 3.

STONE, J.—Under the principles declared in *Savannah and Memphis Railroad Company v. Shearer*, 58 Ala. 672, a good and substantial cause of action is averred and shown against the defendant corporation. The question is, in whom is the right of action? In whose name should the suit be brought? The decedent, intestate, was, at the time of her death, a married woman, and the action was brought in the name of her administrator.

Commenting on the act “to prevent homicides,” of February 5, 1872, Pamph. Acts 83, we, in *Savannah and Memphis Railroad Company v. Shearer*, said, in effect, that the purpose and result of the suit therein provided were not a mere *solatium* to the wounded feelings of surviving relations, nor compensation for the last earnings of the slain. We think the statute has a wider aim and scope. It is puni-

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tive in its purposes. Punitive of the person or corporation by which the wrong is done, to stimulate diligence and to check violence, in order thereby to give greater security to human life; "to prevent homicides." And it is none the less punitive because of the direction the statute gives to the damages recovered. The damages, 'tis true, go to the estate of the party slain, and, in effect, are compensatory; but this does not change the great purpose of the statute—"to prevent homicides." Preservation of life—prevention of its destruction by the wrongful acts or omission of another,—is the subject of the statute; and all its provisions are but machinery for carrying it into effect.

To whom does the compensation go? Not to the husband, wife or child. The statute contains no provision that the recovery shall go to these. It shall be "distributed as personal property of an intestate is now distributed." That is, it goes to the estate of the decedent, with the limitation, that the fund "shall not be subject to the payment of the debts of the deceased." We say it goes to the estate of decedent, for otherwise this limitation would not be necessary. Only the property belonging to estates of decedents is "subject to the payment of" their debts.—*Dibble v. N. Y. & Erie R. R. Co.* 25 Barb. 183.

The language of the statute is, "when the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action." This statute contains no qualifying clauses, limiting its remedial provisions to any class or classes of persons, or excluding any class from its wholesome terms. It employs the word person in its broadest sense, and it would seem that every being falling within that general designation may take shelter under its protecting wings.

The statute declares that "the amount so recovered shall be distributed as personal property of an intestate now is distributed." The plain meaning of this is, that the amount recovered in such action shall go in distribution to the persons, and in the proportion as personal property of the deceased would go, if he or she died intestate. Under our statutes, ample direction is given for the distribution of the personal property of married women who die intestate. Code of Ala. §§ 2252, 2261, 2714. This provision of the statute can not be carried out, unless we allow the personal representative of the person whose death was caused by the "wrongful act or omission of another," to bring the suit. The statute creates the right—a right unknown to the com-

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mon law—and provides a remedy. No other remedy can be pursued. Hence, if we hold that the personal representative of a married woman can not maintain an action under this statute, we deny all redress for the killing of married women by the wrongful act or omission of another. And we also fail, in such cases, to give any operation to the clause of the statute which directs that “the amount so recovered shall be distributed as personal property of an intestate is now distributed.” We do not feel at liberty to deny, in cases which may occur frequently, all operation to so important a clause as that we are commenting on; or to withhold from married women and their distributees, all benefit under this most wholesome statute.

It seems to us that our modern policy, called the married woman’s law, should exert some influence in the interpretation of this statute. Under the common law, all the personal property which belonged to the wife at her marriage, or which accrued to her during the coverture, could be reduced to possession by the husband, and thereby became his. It followed that a transmission of personal property by a decedent wife, was scarcely known. Under this rule, a suit for an injury done the wife must be prosecuted in the joint names of husband and wife, because the damages, when recovered, would belong to the husband. Not so under the woman’s law. “All property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife.”—Code of Ala. § 2705. This was the law of this State when the act “to prevent homicides” was passed.

We think that in the enactment of the statute of February 5, 1872, the legislature meant what they said, “that when the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action” therefor, whether the decedent was *sui juris* or not. In the case of *Dickens v. N. Y. Cen. R. R. Co.*, the administrator of a married woman was allowed to maintain an action for her death, caused by the negligence of defendant. Justice DENIO, delivered the opinion of the Court.—23 N. Y. 158; see *Sanford v. Augusta*, 22 Maine, 536; *Eden v. Lex. & Pr. R. R. Co.* 14 B. Monroe, 204; *McKinney v. Western Stage Co.* 4 Clarke, Iowa, 420; *Williams v. Haldredge*, 22 Barb. 396; *Gunn v. Hudson R. R.* 41 N. Y. (Keyes) 294; *Railroad v. Whitten*, 13 Wall. 270.

In the act under discussion, the right to maintain an action in the name of the personal representative of a person

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whose death was "caused by the wrongful act or omission of another," is limited to cases in which an action could have been maintained by the decedent, if living, for the same act or omission. It is here contended that the wife, if living, could not have maintained an action in her own name, without joining her husband as co-plaintiff, and that her personal representative can not sue. We do not think this is either the object or sense of the clause referred to. The language, "if the former could have maintained an action against the latter for the same act or omission, had it failed to produce death," was intended to declare the character of act or omission which would support the action; not the person by whom it could be maintained. That had already been provided for in the declaration that the personal representative should sue.

What we have said above, taking in connection with our rulings in *Tanner v. Louisville and Nashville Railroad Company*, and *Savannah and Memphis Railroad Company v. Shearer*, at the present term, shows conclusively that the court did not err, to the prejudice of appellant, in the several rulings on demurrer.

There are a few decisions which recognize the doctrine of comparative negligence in suits like this.—See *Chicago and R. I. Railroad Co. v. Still*, 19 Ill. 499; *Chicago B. & Q. R. Co. v. Payne*, 49 Ill. 499; *Ill. Cen. R. R. Co. v. Bucher*, 55 Ill. 379. But we do not recognize that doctrine as sound. In one part of the general charge, the Circuit Court spoke of comparative negligence; but the exception to that charge was general, while the charge itself was given in connection with other matter that was free from objection. In such case we will not sift the charge, with a view of ascertaining if some portion of it does not assert an erroneous proposition.

The charges requested were all properly refused.—See *Tanner v. Louisville and Nashville R. R. Co.* at present term; see *Dennis v. N. Y. Cen. & H. R. Railroad Co.* 47 N. Y. 400.

The release of James Hughes, husband of intestate, is no bar to this action.—See *Stewart v. Kissam*, 2 Barb. Sup. Ct. 493. What effect it may have on his distributive interest in the settlement of his wife's estate, is not for us, at this time, to say.

Judgment affirmed.

On application for a rehearing, the following opinion was afterwards delivered:

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PER CURIAM.—We do not, at all, deny that in cases like the present, when the plaintiff has contributed proximately to the injury of which he complains, and there is nothing else in the transaction, there can be no recovery. We will not enter into the inquiry of *comparative* negligence. On the other hand, we maintain, with inflexible purpose, the general doctrine we declared in *Tanner v. The Louisville & Nashville Railroad Co.*, that primary negligence of one party does not absolve the other from continued diligence, even to the last moment of time, when the catastrophe may be averted. We intended to decide, and now repeat it, that if one, by his own negligence, put himself in peril—yet, if the party sought to be charged, after discovering the peril, or, after being placed in a condition where, if diligent, he would have discovered the peril in time to avert the catastrophe, fails to exert proper diligence, which, if exerted, would probably prevent the disaster, this is culpable negligence, to which the primary negligence of the plaintiff is but remotely contributory. We asserted, and again assert, that if those in charge of a train, engaged in the business of switching cars, within a city, where people are constantly passing, back the train, having box cars in front of the engine, so as to conceal the track on which the train is moving, from the view of those having charge of it, and have no watchman or employee on or near the train to look ahead, and, if need be, to warn persons of the approaching danger, or have the train stopped; and if injury to any person be thereby inflicted, this is, *per se*, negligence, for which an action will lie, unless the party injured, after discovering his peril, fail to use proper exertions to extricate himself therefrom. If he did so fail, this would be proximate, contributory negligence, which would deprive him of all right to recover.

We are aware that some adjudged cases hold the converse of this proposition; and many, perhaps a majority of them, state the proposition broadly, without drawing the distinction which we have attempted. Perhaps the distinction was unnecessary in those cases. But whether so or not, we adhere to our views, and decline to follow cases that assert the contrary doctrine. We do not, in this, intend to declare a rule that is stricter, or less strict, than that declared in *Tanner v. L. & N. R. R. Co. supra*.

And we adhere to our construction of the act “to prevent homicides,” and the right of the personal representative of a married woman to maintain the action therein provided. Any other construction would leave no remedy whatever.

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when the person whose death was "caused by the wrongful act or omission of another," was a married woman. The right and remedy are the creatures of the statute; no common law action could have been maintained in such a case; and the rule in such cases is, that only the action which the statute provides will lie.

The application for a rehearing is overruled.

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Fraudulent Conveyance.

1. *The recital of a deed is not evidence against a creditor of the grantor.* In a controversy between the grantee and a creditor of the grantor, relative to the validity of the conveyance, its recital of the consideration is merely an admission of the grantor, and is not evidence against the creditor.

2. *In such a contest the onus of proving the value and adequacy of the consideration is upon the grantee.*—In such a contest the onus of proving that the conveyance was founded on an adequate and valuable consideration, is cast upon the grantee; and without regard to the motives of the parties in its execution, as to the rights of existing creditors, the deed will be presumed to be fraudulent until the contrary is shown.

3. *Evidence of a consideration different in kind from that expressed is inadmissible.*—Although the nature of the consideration may not be changed, any consideration of the same kind, and not inconsistent with that recited, may be proven; and if it be adequate, will support the conveyance.

4. *The sufficiency of proof is affected by the relationship of the parties.* If the grantor's creditors assail a deed, the sufficiency of proof of the consideration will depend on the relationship of the parties; on the circumstances when the transaction was made, and their subsequent conduct: and if a connection by blood, or marriage, be shown, clear and more convincing proof will be demanded, than would be required in its absence.

5. *A parol gift of land is void.*—A parol gift of land made by a parent to his child is void, and confers no right that can be enforced either at law or in equity. If, subsequently, a deed be executed in consummation of the gift, it is voluntary; it takes effect from the time of its execution, and can not prejudice the rights of existing creditors.

6. *A judgment for an honest debt obtained for a fraudulent purpose is void.*—A judgment may be obtained on an honest debt, and yet recovered and used for a fraudulent purpose. If it should be so obtained and used, it would be void as to all persons whose rights are prejudiced, and who are in a position to assail it.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

Martha Jane Allen, a married woman, by her next friend, Hassan N. Allen, filed her bill of complaint in the Chancery Court of Montgomery county, against William Taylor, Sam--

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nel D. Hubbard, Jr., Mary T. Hubbard, Charles R. Hubbard and Caroline Gilmer, for the purpose of setting aside and vacating the conveyances of the real estate therein described.

The complainant alleged that she and her husband, Hassan N. Allen, instituted suit in the Circuit Court of Montgomery county, on the 22d day of September, 1866, against William Taylor and Francis M. Gilmer, Jr., to recover the amount due on a promissory note executed by them on the sixth day of July, 1860. At the January term, 1868, of the said court a judgment by default was rendered in favor of the plaintiffs for the sum of four thousand four hundred and ninety-seven 60-100 dollars. This was the amount then due on the said promissory note, and was a part of the statutory separate estate of the complainant. On the 25th day of March, 1868, a writ of *fiery facias* was issued by the clerk of the Circuit Court, which was satisfied as to costs only, and returned by the sheriff "by operation of law under General Order No. 6, April 3d, 1868, of Major General Wager Swayne, of the United States Army." Other writs of execution were issued from time to time, which were returned without being executed, until the 29th day of March, 1869, when the sheriff returned the writ issued on the ninth day of March, 1869, with the endorsement upon it of "no property found."

The complainant also averred, "on information and belief, that on, to-wit, the fourth day of February, 1868, the said William Taylor being insolvent, and with the intent to hinder, delay and defraud his creditors of their lawful demands against him, did make, execute and deliver to his son-in-law, Samuel D. Hubbard, Jr., a deed of conveyance of the following described property, to-wit: Lots numbered eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen and twenty, together with a portion of lots numbered twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-six, on the north end of said lots not heretofore deeded, all in square eleven, in that portion of the city of Montgomery known as Whitman's plat, fronting on Perry street, and running back three hundred feet to Lawrence street; also, five head of mules, one horse, twelve head of cattle, three thousand bushels of corn, twenty-five thousand pounds of fodder, all the hogs and farming implements now being used by the said William Taylor in cultivating the plantation seven miles south of Montgomery, known as the estate of A. C. Taylor Place—

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all of which property is in the county of Montgomery and State of Alabama."

The complainant alleged that the conveyance was made for the purpose already stated, and "with the further and specific intent of preventing the lien of the complainant's judgment, which was rendered on the day succeeding the execution of the said deed, from attaching to the property described in said conveyance, and to hinder, delay and defraud the complainant of her said judgment." The sum of seven thousand dollars recited as the consideration of the conveyance was alleged to be "simulated," and a grossly inadequate price for the property conveyed. And that notwithstanding the said conveyance, the said William Taylor continued to reside upon, and retain possession of, the property conveyed.

The complainant alleged, that after the execution of the said deed of conveyance, the said William Taylor transferred to the said Hubbard certain bonds of the Montgomery Mining and Manufacturing Company, upon which bonds the said Taylor was an indorser. This transfer was made in order to enable Hubbard to institute suit against Taylor upon them; to recover a judgment against Taylor, and to subject the property "herein before mentioned to the satisfaction of such judgment, and thus prevent such property from being subjected to the payment of the honest debts of the said Taylor. The said Hubbard, colluding with said Taylor in his fraudulent intent aforesaid, and in execution thereof, commenced suit on said bonds and coupons against said Taylor individually in the City Court of Montgomery on, to-wit, the 18th day of September, 1871; that said cause came on to be tried at the October term, 1871, of the said City Court of Montgomery; the said Taylor employed an attorney to appear for him therein, that it might appear a trial was had and a verdict was rendered in favor of said Hubbard; and said attorney was employed by said Taylor for the further purpose of relieving said Hubbard of the necessity of making any proof in said cause; and on the ninth day of October, 1871, a judgment was rendered in said cause, by consent of said Taylor's attorney, as upon a verdict without any proof being introduced or any trial being had."

The complainant further alleged "that the said Samuel D. Hubbard, Jr., has had an execution issued on said fraudulent judgment, and had the same levied by the sheriff of this county on a portion of the property conveyed by said Taylor to him, as herein before stated, notwithstanding that said

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property or any part thereof, has never been conveyed by said Hubbard to said Taylor, and caused said property to be advertised for sale on the 20th day of May, 1872, at public outcry."

In an amended bill, the complainant alleged, "that Paul Strobach, as sheriff of this county, proceeded on the 20th of May, 1872, to sell a part of the property mentioned in the said original bill, to-wit: Lots numbered eleven, twelve, thirteen and fourteen, on Perry street, in the city of Montgomery, under an execution issued upon the judgment of said Samuel D. Hubbard, Jr. At the time of the said sale, it was publicly announced by the attorney of the complainant, that a bill of complaint had been filed for the purpose of subjecting the said property to the payment of the complainant's judgment above described. Charles R. Hubbard, Esq., was present, and purchased the property for the sum of six hundred dollars, which is alleged to have been "grossly inadequate, as the said property is reasonably worth six thousand dollars, or other such large sum."

The complainant further averred, that since the deed of conveyance was executed by "the said Taylor to the said Hubbard, the said Hubbard has mortgaged a portion of said property to one Caroline Gilmer, to-wit—on the second day of May, 1870—which said mortgage is also signed by M. T. Hubbard, the wife of said Samuel D. Hubbard, Jr., for the purpose of relinquishing her dower interest in said property, and that at the time said mortgage was executed, the said Caroline Gilmer had notice of the existence of your oratrix's said judgment and its lien upon said property, and also that the pretended title of said Hubbard to said property was acquired by fraud as herein stated."

The bill of complaint prayed "that your honor will decree the deed of conveyance from said William Taylor to said Samuel D. Hubbard, Jr., and said judgment in favor of said Hubbard against said Taylor in said City Court of Montgomery, and said mortgage from said Samuel D. Hubbard, Jr., and M. T. Hubbard to said Caroline Gilmer, to be fraudulent and void, and that your honor will decree your oratrix's judgments to be a lien upon said property, and that the same, or so much as may be necessary therefor, be sold by the register of this court to satisfy the said judgment of oratrix, with costs, and interests and expenses of said sale," &c.

The defendants denied that the deed of conveyance was made by said Taylor to the said Hubbard on the fourth day

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of February, 1868, but alleged it was executed on the fourth day of January, of that year, and was then filed for record in the office of the judge of probate of Montgomery county; they denied that the said William Taylor retained possession of the said property after he executed the conveyance to the said Hubbard, or that the consideration was "simulated," or grossly inadequate for the property, or that it was worth \$20,000; they "aver the said Samuel D. Hubbard has had and held possession of said property, residing upon the real estate therein conveyed ever since the making of the said deed, and yet does; and the said William Taylor, who is old and infirm, and father of said Samuel D. Hubbard, Jr.'s wife, and who is without a family, has lived and boarded with the said Samuel D. as a guest."

The defendants denied that the bonds of the Montgomery Mining and Manufacturing Company, indorsed by the said William Taylor, were in his possession; or that he transferred them to the said Samuel D. Hubbard, Jr., with the intent to delay, hinder and defraud his creditors, or for any other purpose whatever; or that the said Taylor ever owned the said bonds or had any interest in them. They allege that the said Samuel D. Hubbard, Jr., on his own account and for himself bought "the said bonds from the true *bona fide* owners thereof, and that such purchase was a genuine *bona fide* business transaction, made with no intent to delay, hinder or defraud the creditors of the said William Taylor."

The defendants admitted that said Samuel D. Hubbard, Jr., instituted a suit against said William Taylor on the said bonds and coupons, and recovered a judgment against said Taylor at the October term, 1871, of the City Court of Montgomery, for the sum of \$27,614.30, which still remained unsatisfied. An execution was issued by the clerk of the City Court of Montgomery on the 18th day of December, 1871, and placed in the hands of the sheriff of the county. The sheriff, on the 18th day of January, 1872, returned the said *fi. fa.* with the endorsement, "no property found."

Afterwards, on the 12th day of April, 1872, another writ of *feri facias* was issued by the said clerk, and was received by the sheriff of the county, and by him was levied on lots eleven, twelve, thirteen and fourteen, in square eleven, in Whitman's plat, east side of Perry street, in the city of Montgomery, as the property of William Taylor.

"The said Samuel D. Hubbard, Jr., further answering, says that he caused said lots to be levied on and advertised for

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sale, and afterwards sold under the advice of his attorneys for the following reasons, viz.: Before the execution of said deed of bargain and sale, the said William Taylor, who is the father to said Mary T. Hubbard, wife of this defendant, had made a deed of gift to the said Mary T. Hubbard of said four lots, by which this defendant is advised the legal title to said four lots passed from said William Taylor to Mary T. Hubbard; but by some proceeding they could be made subject to the debts of said William Taylor, contracted before said deed of gift was executed. The title having passed out of said William Taylor by said deed of gift to Mary T. Hubbard, it was doubtful if the deed of the said William Taylor to this defendant, made on the fourth of January, 1868, conveyed to him a sufficient legal title."

The defendants admitted the execution of the mortgage to Caroline Gilmer, and alleged the said notes and mortgage were executed for the purchase of some of the said bonds from said Caroline Gilmer, on which said judgment of Samuel D. Hubbard, Jr., against William Taylor was recovered. Said Caroline Gilmer, "before and up to the time of the said sale, was the owner of the said bonds; and the said Taylor had no interest therein."

The defendants denied that "said Charles R. Hubbard had read the bill of the complainant, or knew of its contents when said sale was made. They allege that by said purchase on the 25th day of May, 1872, and by force of a deed then executed by said sheriff to said Charles R. Hubbard, conveying said lots to him, which conveyance was then duly executed and delivered, and the purchase-money paid by said Charles R. Hubbard, he became, and was, possessed of all the right and title of said William Taylor which could be sold under the said judgments and executions." They denied that the "lots were worth \$6,000, or that the price at which said lots were sold was grossly inadequate; and deny all fraud with which they are charged."

In addition to the answer made by all of the defendants, Samuel D. Hubbard, Jr., and Mary T. Hubbard, his wife, filed their cross-bill. They allege that William Taylor was a man of large fortune, and that even after the war his property was estimated at \$500,000. He did not know as late as 1868 and 1869, that his indebtedness exceeded a trifling sum in comparison with his wealth. But that afterwards very heavy liabilities were fixed upon him as a member of a partnership in which he "was not an active or managing partner, nor did he know its financial condition."

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The said William Taylor advanced to his children when they arrived at maturity or married, property valued at about \$25,000. "The advancements made by him to the last of his children, except your oratrix (who is the youngest), was made in the year 1858, when his wealth remained unimpaired, and he then by verbal declaration and oral gift set apart for your oratrix four hundred acres of land, and ever afterwards regarded it as hers. He made no title to the same until after the marriage of your orator and oratrix. When your orator, having contracted to sell said land, the said William Taylor, at the request of your orator and oratrix conveyed said land to the purchaser, and the sum and its proceeds have ever since been enjoyed by your orator and oratrix.

"Your orator and oratrix intermarried in October, 1865. Mrs. Taylor, the wife of William Taylor and mother of your oratrix, owned a separate estate, and died intestate in 1866. Before the marriage of your oratrix, her mother gave to her several valuable birth-day presents in money, derived from her estate. These sums your oratrix lent to said William Taylor, and held his note therefor, amounting to eleven or twelve hundred dollars. At the death of her mother, your oratrix became entitled to a considerable sum, inherited from her mother; but the precise sum she is unable to state. This was in the hands of the said William Taylor, her father; and having confidence that he would do her no wrong, she did not bring him to a strict settlement.

"Shortly after the marriage of your orator and oratrix, the said William Taylor made some estimate of what he was indebted to your oratrix for the use and rents of her land so set apart for her in 1858, and of which he had the use for six or seven years; and the result was that he found himself indebted to your oratrix in the sum of five thousand dollars, for which he gave his note.

"Between the marriage of your orator and oratrix, and the fourth day of January, 1868, your orator lent and paid for said William Taylor several considerable sums of money, the precise amount not remembered. Said Taylor had also paid to your orator, on account of said indebtedness to oratrix, some railroad stock, from which he realized \$2,500 or \$3,000. And on the 4th day of January, 1868, there was due from said William Taylor, to your orator and oratrix, a large sum, including interest, to-wit, the sum of about \$15,000.

"The said William Taylor advanced to your oratrix about

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the 11th day of September, 1866, four vacant lots in the city of Montgomery, numbered eleven, twelve, thirteen and fourteen, in square eleven, Whitman's plat, worth about \$1,500. He next advanced her a note of James M. Taylor for \$5,800, with a mortgage on land, given to secure its payment. The said James M. Taylor soon afterwards died insolvent, and the land is not worth exceeding \$3,000. He had no other property.

"The said William Taylor, still being largely indebted to your orator and oratrix, he made and executed the deed bearing date January 4th, 1868, mentioned in the original bill in this cause, on the recited consideration of \$7,000, the full value of the property conveyed. This was in part payment of the \$15,000 due from said William Taylor to your orator and oratrix. All these several advancements and payments were made in good faith; and, taken at the highest estimate placed upon them, they fall short five thousand dollars and more of making your oratrix equal with the advancements made by the said William Taylor to his older children."

The complainants in the cross-bill also averred that lots numbered eleven, twelve, thirteen and fourteen, in square eleven of Whitman's plat, were levied on by the sheriff to satisfy executions, issued on the judgments above mentioned. The lots were sold on the 20th of May, 1872; "and Charles R. Hubbard became the purchaser, for the sum of \$600, and received the sheriff's deed therefor. The proceeds, \$500, after paying costs, were applied as a credit on the execution issued in favor of" said Samuel D. Hubbard, Jr. "Subsequently, on the 24th day of May, 1872, your orator, being advised that it was doubtful if said advancement of said four lots was valid against debts of said William Taylor existing at and before the date of such advancement, paid to said Charles R. Hubbard, all the money he had paid in such purchase, all expenses he had paid and incurred, and all proper charges; and having entered a credit of \$1,400 on said judgment, redeemed said lots eleven, twelve, thirteen and fourteen from said Charles R. Hubbard, and received from him a deed of conveyance."

The said cross-bill prayed "that the title to the said several pieces of property be quieted; and that Hassan N. Allen and Martha J. Allen, their aiders and abettors, be enjoined from molesting orator and oratrix in the enjoyment of said property."

The complainant, Martha J. Allen, moved to strike from

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the files of the court the said cross-bill, on the following grounds, viz:

1st. "Said cross-bill was filed after the said Mary T. Hubbard and Samuel D. Hubbard, Jr., and all the defendants to the original bill, had answered the original bill of complaint, and after the publication of testimony in said cause, and no leave of court was obtained therefor.

2d. "The said Mary T. Hubbard and Samuel D. Hubbard, Jr., have no right to file said cross-bill at this stage of the proceedings in said cause, without first obtaining leave of the court, and the filing of the same will cause unnecessary delay and expense in said cause."

The foregoing motion was heard by the court and overruled.

The complainant, Martha J. Allen, then filed an answer to the said cross-bill, and demurred to it on the following grounds, viz:

1st. "Said cross-bill fails to show or set forth any fact or facts which entitle the complainants therein to the relief they seek thereby, or to any relief.

2d. "Said cross-bill makes an entirely new case.

3d. "Said cross-bill is inconsistent with the answers of the complainants therein.

4th. "Said cross-bill is repugnant to the answers filed by said Samuel D. Hubbard, Jr., and the said Mary T., to the original bill.

5th. "Mrs. Caroline M. Gilmer, one of the defendants to the original bill, is a necessary party to the said cross-bill, and is not a party thereto.

6th. "Said cross-bill seeks to contradict and vary by parol proof the term of a written deed of conveyance.

7th. "Said cross-bill seeks to set up and establish a different and distinct consideration for the deed of January 4th, 1868, from said Taylor to said Samuel D. Hubbard, Jr., from that mentioned in the said deed itself.

8th. "It appears in and by said cross-bill that said complainants are estopped from seeking the relief they therein seek.

9th. "It appears from said cross-bill that the said deed of January 4th, 1868, from said Taylor to said Samuel D. Hubbard, Jr. is fraudulent and void.

10th. "Said cross-bill is without equity."

On hearing of the cause it was "ordered, adjudged and decreed, that the said William Taylor pay to the said complainant, or her solicitors, within thirty days from this date,

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the said sum of seven thousand four hundred and seventy-nine 55-100 dollars, with interest from date of the date of said report of the register, to-wit, May 16th, 1876.

“It is further ordered, adjudged and decreed, that the judgment obtained by said Samuel D. Hubbard, Jr., against the said William Taylor, at the October term, 1871, of the City Court of Montgomery, for the sum of twenty-seven thousand six hundred and fourteen 30-100 dollars, and all proceedings taken thereafter by said Samuel D. Hubbard, Jr., as shown by the pleadings and proof in this cause, be, and the same are, hereby set aside and vacated as against complainant in this cause.

“It is further ordered, adjudged and decreed, that the sale of the property made by the sheriff of Montgomery county on said judgment, and the deed made by the said Charles R. Hubbard to said Samuel D. Hubbard, Jr., on the 24th day of May, 1872, of the property purchased by said Charles R. Hubbard at said sale, and the redemption of said property by said Samuel D. Hubbard, Jr., from said Charles R. Hubbard, be, and the same are, hereby set aside and vacated as against the said complainant.

“It is further ordered, adjudged and decreed, that the said deed executed by the said William Taylor to said Samuel D. Hubbard, Jr., on the fourth day of January, 1868, by which he conveyed the property ‘heretofore described’ to the said Samuel D. Hubbard, Jr., and said deed of September 11th, 1866, from said William Taylor to said Mary T. Hubbard, be, and the same are, hereby set aside and vacated as against said complainant. And that in default of payment by said William Taylor to complainant of the amount herein before mentioned, and within the time prescribed, the register of the court, after giving notice as prescribed by law, will proceed to sell, at public outcry, at the Artesian basin, in the city of Montgomery, Alabama, for cash, the real property described in said deed of January 4th, 1868, or so much thereof as may be necessary to satisfy the complainant’s said demand, the costs of this suit, and the expenses of this sale,” &c.

DAVID CLOPTON, for appellants.—1. Such a conveyance as that of Taylor to Hubbard will be upheld if it be an actual sale at a fair and reasonable price, and no secret trust or benefit is reserved to the grantor, although both parties may know that the grantor is otherwise indebted, and such sale will leave him unable to pay the other debts. To render a

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transaction of this kind fraudulent, there must be some interest left to the debtor, some reservation inconsistent with a true sale, some cloaking of the surplus, so as to cover it up for the benefit of the debtor or his family, or some secret trust or reservation of advantage to the debtor.—50 Ala. 213; 21 Penn. (St. Rep.) 495; 61 N. Y. 626; 20 N. J. Eq. 13; 4 Halst. 139; 5 B. Monroe, 298; 39 Texas, 544.

2. In such a transaction, the *bona fides* of the consideration and its sufficiency being established, the only remaining inquiry ordinarily is, was there any reservation of any use, benefit or interest whatever to the debtors?—Authorities, *supra*, 29 Ala.; 34 Ind. 49. An inference of fraud can not be drawn from the price paid, unless the property should be sold below the market value, or price, so much as to strike the understanding at once with the conviction that such a sale could not have been made *bona fide*. This inadequacy is necessary, *per se*, to authorize a sale to be annulled, or an inference of fraud. A less degree may be a mark of fraud, but other circumstances must be associated with it.—11 Ala. 484; 8 Ala. 104, 117.

3. As to the purchase of the bonds and suit thereon. The charter of the company in evidence, shows the corporation had no authority to borrow money.—31 Ala. 76; 35 Ala. 323; 36 Ala. 313. There was no necessity for, or propriety in, suing the maker.—Rev. Code, § 1854; 1 Brick. Dig. p. 279, §§ 380, 385, 388. The depositions of Hubbard and Bibb state the transaction as to these bonds, and of C. R. Hubbard as to the circumstances of the suit and judgment. Taylor says he had no defence to the bonds, was president of the company and knew of their issue and non-payment, and he requested that Mr. McIntyre should see that the calculations were correct. There is not the pretence of any fraud in this transaction.

4. In this case the oath to the answer was waived; but for the purpose of proving fraud, the complainant examined twice both Taylor and Hubbard. They were her witnesses; she may prove they *were mistaken*, which she has not attempted to do, but she will not be allowed to discredit them. 1 Greenl. Ev. § 444; 22 N. Y. 151; 4 Gray, 535. In *Marshall v. Croom*, 52 Ala. 554, it is said the sworn answer of defendant “is equal to the testimony of any other witness; and as the plaintiff can not prevail unless the balance of proof is in his favor, he must either have two witnesses or some circumstances in addition to a single witness in order to turn the balance.” *A fortiori*, how much stronger proof will be

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required to turn the balance in favor of complainant, when the only two witnesses whom she has examined to show the fraud deny it *in toto*, and whom, in order to succeed, she must convict of perjury, after having, by their examination, vouched for them as credible witnesses? The complainant being forced by the law to stand by the case made by her own testimony, there is no pretence for holding there was fraud in this case.—64 Me. 239; 5 T. R. 235; 33 Ala. 469; 4 B. Mon. 296; 4 *ib.* 423.

BRAGG & THORINGTON, for appellee.—1. Section 1865 of the Revised Code is established for the suppression of fraud, the advancement of justice and the promotion of the public good; consequently it should be liberally construed to suppress fraud, abridge the mischief and enlarge the remedy. Bump on Fraud. Conv. p. 59, and authorities in note 4.

2. The withering influence of the statutes extends to all feoffments, gifts, grants, judgments and executions; and the principles of the common law will embrace every principle not enumerated in the statute.—Bump on Fraud. Conv. pp. 273-4 and 259. Equity looks at substance and not at form. "It penetrates beyond externals to the substance of things, and it accounts as nothing, and delights to brush away barricades of written articles and formal documents, when satisfied that they have been devised to conceal or protect fraud."—4 Bankr. Reg. (2 ed.) 290.

3. Fraud, as denounced in equity, includes all acts, omissions or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, which are injurious to another, or by which an undue and unconscientious advantage is taken of another.—2 Ala. 593. Fraud is the judgment of the law on facts and intents.—5 Ala. 531; 11 Ala. 207. But fraud does not necessarily impute a corrupt or dishonorable motive; parties may be animated by motives of affection or compassion.—Bump on Fraud. Conv. 72.

4. Actual fraudulent intent need not be shown—the intent is to be assumed from the acts of the parties; the motives which actuate men in the affairs of life can in general be ascertained only by an examination of their acts, and all the concomitant circumstances.—*Id.* pp. 281-2-3. As a general rule, great latitude is allowed in the range of evidence when the question of fraud is involved. It is indispensable to truth and justice that it should be so; for it is hardly ever possible to prove fraud, except by a compre-

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hensive and comparative view of the actions of the party to whom fraud is imputed, and his relative position a reasonable time before, and a reasonable time after, the time at which the act of fraud is alleged to have been committed. 25 Ala. 174; Bump on Fraud. Conv. pp. 541-551; 5 Ala. 324; 23 Ala. 801.

5. The intent to hinder and delay is sufficient to vitiate the deed.—Bump on Fraud. Conv. pp. 66 and 67 and note 1; 41 Ala. 163. The term *delay* refers not merely to *time*, but to the interposition of obstacles in the way of creditors with the fraudulent intent to hinder and delay.—Bump. on Fraud. Conv. p. 67. Conveyances executed under whatever pretence, by an individual unable to pay his debts, will be held presumptively void as against creditors in the hands of a grantee who had knowledge of the facts.—23 How. 477; 20 ib. 45; 6 McLean Rep. 23. *If part of the consideration for a transfer is merely nominal or colorable, contrived to hinder, delay or defraud creditors, the whole transfer is void.* Bump on Fraud. Conv. 470; 14 Ala. 557; 41 Ala. 242.

6. Proof by the creditor that the consideration mentioned in the deed was never in fact paid, and that the deed is *only a gift*, is competent.—2 Ala. 648. And this, although it recites a valuable consideration as an inducement to its execution.—12 Ala. 18. When a conveyance is made with the intention to hinder and delay a creditor in the collection of his debt, it is void as against the creditor, although a valuable consideration was paid.—41 Ala. 173; 38 Ala. 329; 30 Ala. 396; 15 Ala. 525; 14 Ala. 557; 11 Ala. 207-213; 3 Stew. 243. If the conveyance is for a valuable consideration it must also be *bona fide*, and if it is not, it is void. Bump on Fraud. Conv. 230; 41 Ala. 168; 8 Ala. 104; 6 Wall. 299

7. Actual notice by the grantee of the grantor's fraudulent intent is not necessary, if he had the means of knowing by the use of ordinary diligence; or if he knew enough to put him on inquiry.—Bump on Fraud. Conv. 232. A general charge of fraud is sufficient.—2 Ala. 604. Any one badge of fraud may impeach the conveyance, and several may unite and the transaction may be upheld, but *the concurrence of several badges of fraud makes a strong case.* Bump on Fraud. Conv. 78.

8. When one charged as *particeps fraudis*, is examined as a witness to prove the contract fair, he can expect credence only when he makes a full and frank disclosure of all the facts.—7 Ala. 278-9. The forms of proceedings of courts

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of equity are flexible, and may be suited to the different postures of the case. They may adjust their decrees so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain and model the remedy so as to suit it to mutual and adverse claims, controlling equities and substantial rights of all the parties.—29 Ala. 410.

9. It is a principle of law, that a transfer in pursuance of a parol agreement takes effect against creditors only from the time the conveyance is actually made.—Bump on Fraud. Conv. 249, note 4; 5 Ala. 719.

BRICKELL, C. J.—Conveyances of property real and personal, whether the consideration is adequate or inadequate, good or valuable, if made in good faith, are valid and operative as between the parties. But as against the existing creditors of the grantor, they can not be supported, unless shown to have been founded on an adequate and valuable consideration. When between the grantee, and an existing creditor, a controversy arises as to the validity of the conveyance, it has long been the settled rule of this State, that the recital of a consideration, is the mere declaration or admission of the grantor, and is not evidence against the creditor.—*McCain v. Wood*, 4 Ala. 258; *Br. Bnk Decatur v. Kinsey*, 5 Ala. 9; *McGinty v. Reeves*, 10 Ala. 137; *McCaskle v. Amarine*, 12 Ala. 17; *Falkner v. Leith*, 15 Ala. 9; *Dalin v. Gardner*, ib. 758. The bill avers, and the answers admit the averment, that the debt on which the judgment in favor of the appellee was rendered, was contracted in 1860, about eight years before the deed was executed by Taylor to Hubbard. The *onus* of proving that the deed was not a mere voluntary conveyance—that it was founded on an adequate and valuable consideration, is consequently, by law, cast on the appellants. Whatever may have been the motives of the parties in its execution, as to creditors whose rights were existing, it must be regarded as merely voluntary, and presumed to be fraudulent, until the contrary is shown.

The deed is of bargain and sale, and recites as its consideration, *the sum of seven thousand dollars lawful money of the United States*, paid by the grantee to the grantor. The consideration, (in the absence of fraud and mistake, and on an application to a court of equity, for a reformation), can not be varied by parol proof. A valuable consideration being expressed, a consideration of that kind must be shown—it is not permissible, if it would be available, to show a good consideration. While the value of the consideration may

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not be changed, any consideration of the character of, and not inconsistent with that expressed may be shown, and if it is adequate will support the conveyance. It is certainly very desirable, that all legal instruments should truly declare the actual considerations on which they are founded. Especially would it be better, when the rights of persons, strangers to them, are to be affected. But the law is satisfied when a consideration of the kind expressed, is satisfactorily shown. A deed reciting a pecuniary consideration, may be shown to have been taken in payment of a debt, though it declares, as does the present deed, that the money was actually paid to the grantor. The two considerations are of the same character—equally meritorious and adequate, and the nature of the conveyance is not altered. But that the real consideration was not pecuniary—was mere love and affection—was good, not valuable, it is not admissible to prove. The nature of the conveyance would be changed, and the consideration proved, would be different from, and inconsistent with that expressed.—*Murphy v. Br. Bnk Mobile*, 16 Ala. 90; *Potter v. Gracie*, 58 Ala. 303; *Ellinger v. Crowl*, 17 Md. 361; *Cunningham v. Droyer*, 23 Md. 219; *Hildreth v. Sneeds*, 2 Johns. Ch. 35; *Bump on Fraud. Conv.* 579.

The consideration attempted to be proved in support of the deed, is not the payment of money to the grantor, but the extinguishment of an indebtedness owing by him to the grantee, and to his wife, the daughter of the grantor. The sufficiency of the proof of a consideration, must depend on the relations existing between the parties, the circumstances surrounding them when the transaction is entered into, and their subsequent conduct in reference to it. Clearer and more convincing proof will be required if these are calculated to excite a just suspicion of the fairness of the transaction. Transactions between parent and child are jealously watched in a court of equity, even when the controversy arises between them, and are sustained only when shown to be free from the taint of the influence of the relation. There are older authorities which hold that when the controversy is with creditors, relationship by affinity, or consanguinity, is a badge of fraud. The generally received opinion now is, that it is a mere circumstance dependent for its value on its connection with other circumstances, which serve to throw light upon and give color to the transaction.—*Bump on Fraud. Conv.* 54. When it exists, and the rights of creditors are involved, clearer, fuller proof must be given of an adequate and valuable consideration, and of the good

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faith of the grantee or vendee, than would be required of a stranger.—Bump on Fraud. Conv. 54; *Lloyd v. Williams*, 21 Penn. 327.

The indebtedness of Taylor, to his daughter, Mrs. Hubbard, which is said to have been the material element of the consideration of the deed, and of other transfers of property to Hubbard, soon after his marriage, consists of three distinct items, which are thus enumerated in the written argument of counsel—"note for rents of land, \$5,000.00; distributive share of mother's estate, \$12,000.00; note for money of Mrs. Hubbard, \$1,110.00." Let us examine the evidence in relation to these items separately. The first, a note for the rent of land, was made in 1865. The land was given the daughter by parol in 1858, while she was an infant, to equalize her advancements of real estate, with those Taylor made to his other children. Taylor remained in possession until after the marriage of the daughter, and no conveyance or other written evidence of the gift was ever executed. In 1866, the husband of the daughter having made sale of the lands, at his request, Taylor executed a conveyance to the purchaser. The parol gift of the land to the daughter was void. It vested in her no right or title, legal or equitable, to which rent could be an incident. The father could have consummated the gift by a conveyance, but it rested merely in his volition, whether he would consummate or repudiate it. The gift was voluntary, and if a subsequent conveyance had been made merely in consummation, the conveyance would have been also voluntary; the estate of the daughter would have commenced from the day of its execution, and would not have related to the time of the parol gift.—*Hendon v. White*, 52 Ala. 597; *Davis v. McKinney*, 5 Ala. 719; *Rucker v. Abell*, 8 B Monroe, 566. In this last case it is said: "Any other doctrine would enable a father, by a verbal gift of his land to his children, retaining the title in himself, either to remain the real, as well as ostensible proprietor of the property, or by a completion of the gift, to divest himself of all right and title to it, whenever circumstances might render it necessary to do so for the purpose of placing it beyond the reach of his creditors. Such a power on the part of the father, the ownership of the property affording him the means of obtaining a delusive credit, would open a wide door for the introduction of fraud and imposition upon creditors." A debt forming a consideration which will against creditors support a transfer of property must rest not only in moral, but

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in legal obligation, and the law must furnish a remedy for its enforcement. Statutes may bar the remedy, and if there is a valuable consideration, the statutory bar may be waived, the debt converted into a legal demand, and it will become a sufficient consideration to support a transfer or conveyance. Or, the statute of frauds may operate a bar to the enforcement of promises or agreements, for which there was a valuable consideration, and which are morally binding, the statute may be waived, and the agreement executed, without just cause of complaint by creditors who have not acquired liens. But a mere inchoate gift, it is not in the power of the donor to consummate to the prejudice of creditors.—Bump on Fraud. Conv. 220. Gratuitous promises, not resting on a valuable or meritorious consideration, are not recognized and enforced in courts of law or equity. *Kirksey v. Jones*, 8 Ala. 131; *Forward v. Armstead*, 12 Ala. 124. The note for rents was without consideration, incapable of enforcement by legal remedies, and can not be considered as forming a consideration which will support the deed against creditors.

The next item of indebtedness—the interest of Mrs. Hubbard in her mother's estate is not shown by the clear and full proof, which the law demands to support a conveyance made by an insolvent debtor to a child, or to a son-in-law. In this case there is not only insolvency, with its attending vexations of suits and judgments, and the relationship existing between the parties, but there is a combination of other suspicious circumstances, exciting the jealousy of the court, and which demand clear, full proof not only of consideration, but of the freedom of the transaction from all impurity of intention. The previous transfers to the son-in-law of choses in action founded on the same considerations as the deed—the prior voluntary conveyance to the daughter of a part of the real estate, and the effort to protect the title by a subsequent sale under execution, at which there were no other bidders, than the grantee, and his brother, who was the attorney procuring the judgment for the grantee,—and the successful bidder—the immediate redemption from him by the grantee, are circumstances casting a cloud on all the transactions, and which it was the duty of the parties to remove by clear, convincing evidence. Now, the evidence in reference to the alleged indebtedness of the grantor, on account of the share of his daughter in the property the mother had brought into the marriage, is too vague and indefinite, to justify any court in pronouncing that there was

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in law any such indebtedness. Of what the property consisted—when it was received—whether it was then impressed with any trust which excluded the marital rights of the husband, or, whether the statutes excluding these rights were then of force, are matters of which there is no evidence. Slaves may, and probably did constitute a large part of the fortune of the wife, and emancipated by operation of law, the husband was freed from all liability to account, if such liability ever existed. The grantor is the only witness who testifies in reference to this indebtedness, and it was his duty as the facts rested peculiarly within his knowledge not to have left them, to say the least, in doubt and uncertainty. The fair and just inference from his meagre statements, is, that though there was no legal obligation, he felt himself under a moral obligation to account to his children for the property the mother had brought him. It seems that in the life of the mother, he had advanced to his older children an amount equal to that which is now claimed as due to his youngest daughter, and if these advances were made in obedience to a legal obligation, and not as a mere matter of affection, the property must have been impressed with some trust, by the terms of the gift to the mother, which ought to have been shown.

The evidence in regard to the item for money loaned by the daughter—or rather money given her, as birthday presents, which the grantor used, is not of that character, which the case demands. No memoranda, no account of these presents was kept—no evidence of debt was given for them, until about the time of the marriage of the daughter, and until the insolvency of the father. These from memory, without any data to guide him, with no recollection of the years in which the presents were made, or the amount given at any one time, he estimates that they amount to eleven or twelve hundred dollars, and gives the daughter a note for the amount. The daughter is not examined, and the debt stands on the unsupported evidence of the grantor. The debt may really exist, but it must under the circumstances be shown by clearer and fuller evidence, against a creditor whose debt and rights are fully established. A consideration or a debt of this kind is so easily feigned between parent and child, that it is mere justice, when the rights of *bona fide* creditors are involved, to demand that it be fully proved.

The remaining item of indebtedness, which it is said formed a part of the consideration of the deed, is money

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loaned by the grantee to the grantor. The evidence in support of this item is unsatisfactory. It is said by the grantee the money was loaned in different sums, at different times, through a period of twelve or eighteen months—no evidence of debt was taken, and the grantor declares that he has no recollection of having borrowed it, and consequently none that it formed any part of the consideration of the deed. A fact, not without its importance, attending all the transactions, is, that though the grantor parted with property of considerable value, in payment of these several items of indebtedness, no receipt or release was ever given him, and the transfers do not indicate that he was entitled to be discharged. A *bona fide* creditor, though he be closely allied to his debtor, and the latter insolvent, may take property at a fair price in payment of his debt, and his title will be unassailable. The law does not forbid it; and the debtor may be moved by the influences of relationship, in preferring the creditor. If other creditors assail the transaction, it is no hardship to require clear proof of the debt, and a reasonable explanation of every suspicious circumstance. The means of proof, lie within the ability of the parties, and if they do not produce it, the transaction must be pronounced fraudulent as to complaining creditors.

The cross-bill is filed for the purpose of enabling Hubbard and wife, in the event they failed to sustain the deed, to retain the property conveyed by it, in satisfaction of the alleged indebtedness to Mrs. Hubbard, and also in satisfaction of two judgments which Hubbard claims to hold against the grantor. We have declared the evidence does not show an indebtedness to Mrs. Hubbard, and her right to relief therefore fails. This would be fatal, for the principle that when two join as complainants, they must show that they have a common or joint interest, and are both entitled to relief, and the want of interest, or right to relief of one, compels a dismissal of the bill, is as applicable to a cross-bill, as it is to an original bill. But it is not necessary to the affirmance of the decree of the chancellor that it should be rested on this narrow and technical ground. Hubbard has accepted a deed expressing an actual moneyed consideration, and has failed to prove that the consideration was real. The deed is void as to creditors—it conferred on him no title. The law condemns as wrongful its acceptance, and condemns the possession derived under it. His duty was to reconvey it to the insolvent debtor; failing in that duty, he is regarded as a trustee *in invitum*, holding for the benefit of creditors. It

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would encourage, not suppress fraud, if he was permitted when the conveyance fails, to retain the property in satisfaction of demands, however just, the grantor may be liable for to him, and which were subsequently acquired forming no part of the consideration of the deed. Indirectly, effect would be given to the conveyance the statute of frauds denounces as void. There may be cases of purely voluntary conveyances, in which the donee is innocent of either actual or constructive fraud, and a court of equity would protect his possession until any just debt he had against the donor was satisfied; or would so mould a decree granting relief to other creditors, as to require payment to him, or placing him on an equality with them.—Bump on Fraud. Conv. 596. Or an innocent donee may remove incumbrances, and he will be entitled to indemnity, if the conveyance is set aside at the instance of creditors.—*Potter v. Gracie*, 58 Ala. 303. Hubbard does not stand as an innocent donee, claiming under a purely voluntary conveyance. The deed of bargain and sale, purporting to be founded on a pecuniary consideration, and fails for want of proof of that consideration. There is no principle upon which the deed can stand as a security to him for debts due him from the grantor. Tainted with actual fraud, it must be set aside altogether.—Bump on Fraud. Conv. 597; *Mariatt v. Givens*, 8 Ala. 694; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336. There are other cases in which a grantee or vendee will be protected by a court of equity, though at law the conveyance would be wholly condemned. The particular circumstances of the case, may justify a court of equity, in allowing the conveyance to stand as a security for the amount the donee or vendee may have advanced on the faith of it; or it may compel a vendee when he has purchased at an inadequate price, to pay the difference between the price and the actual value. Or may permit it to stand as a security for the debt, really due, if it was intended as a security for, or payment of such debt when right and justice require it.—*Clements v. Moore*, 6 Wall. 299; *Price v. Masterson*, 35 Ala. 483. But a party claiming under a conveyance which is actually fraudulent, because made without a valuable consideration, while expressing that consideration, and who attempts and fails entirely to sustain the consideration,—has no equity to claim the retention of the property either as security for, or in payment of independent and distinct demands against the vendor or grantor. As to creditors he has acquired the property tortiously, and

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he stands in the same attitude he would stand in towards the grantor, or vendor, if he had taken possession by an admitted trespass—the conveyance under which he derives title and possession is void, not warranting the possession. It is plain that a mere creditor at large obtaining possession of the property of his debtor by force or fraud, can not set up his debt as an excuse or justification of his tort.—*Stetson v. Goldsmith*, 31 Ala. 649; *Harrison v. McCrary*, 37 Ala. 687. The reason and foundation of the principle, that a right cannot grow out of a wrong, is as applicable to the donee or vendee guilty of actual fraud, as it is to the trespasser.

Nor can his redemption of the four lots, from the purchaser at the sheriff's sale, avail him. We do not enter on the inquiry whether the judgment under which the sale was made was founded on a just debt. A judgment may be obtained on an honest debt, and yet obtained and used for a fraudulent purpose.—*Bum v. Abd*, 29 Penn. 387. When so obtained and used, it is void as to all whose rights are offended, and who are in a position to assail it. It is not a pleasant, and a rather unprofitable task, to recapitulate the evidence which induces us to concur in the conclusion of the chancellor, that the judgment was obtained and used for the purpose of protecting the property sold from pursuit by the creditors of Taylor. Admitting the endorsement of the bonds fixed a liability on Taylor, he alone, of the several indorsers, is sued. The judgment is rendered at a term of the court when the cause was triable only by consent of the defendant. No defence was made, nor was it intended that any should be made, and yet the record is made to bear the form of a judgment rendered on the appearance of the defendant by attorney, and on issue tried by a jury, and in the absence of the attorney, requested by the plaintiff's attorney to represent the defendant. The execution is levied on real estate, in which the defendant had no interest, and which was the property of the plaintiff in execution, if the deed to him was valid. The sale was made after the filing of the present bill, and after notice of it to Hubbard and his attorney. At the sale, the attorney, Hubbard's brother, and Hubbard, are rival bidders, and the only bidders, the former becoming the purchaser. Four days thereafter the formalities of a statutory redemption are gone through, and a conveyance is executed to Hubbard. These circumstances, it may be possible to explain, removing the unfavorable inferences which must be drawn from them. There is an absence

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of all explanation, and no other conclusion can be drawn than that the judgment was obtained, with the intent to use it as it was used, to affect and prejudice the pre-existing rights of the *bona fide* creditors of Taylor.

The conveyance of the lands by Taylor to Griffith, in pursuance of the parol gift he had previously made to his daughter, was fraudulent as to his creditors. Title doubtless passed to Griffith, because he was a purchaser without notice. The purchase money in the hands of Hubbard, was liable to the demands of creditors—held by him as a trustee for their benefit.—Bump on Fraud. Conv. 589. When the lands were resold by Hubbard, after the rescission of the sale to Griffith, the purchase-money still remained a trust fund, which creditors could pursue. It was not in the power of Hubbard, by any application he could make of the purchase-money, or by any transfer of the notes given for it, so far as he is concerned, to divest it of its character as a trust fund, or to affect the rights of creditors. When he applied these notes, to the extinguishment of the mortgage given Mrs. Gilmer, and which is valid as against creditors, because she was without notice of the infirmity of his title, removing that mortgage as a prior lien, it was an application for the benefit of creditors, a court of equity would have compelled. The transfer of the mortgage to his wife, was without consideration, and conferred on her no right to keep it alive as a prior lien defeating the right of Taylor's creditors.

The exceptions to the register's report, raise no other question than the period of time, at which the value of the corn, acquired by Hubbard under the deed, should be computed. The chancellor was of opinion, that it should be computed at the time of the conveyance, when possession and use passed to Hubbard. The exceptions are based on the hypothesis that he should be charged with its value, at the time of taking the account. A fraudulent grantee, converted into a trustee, is subject to the general principle governing all trustees, that he shall derive no benefit and take no advantage from his relation. Having converted the corn long prior to the taking of the account, and its conversion, (being property consumable in use,) having commenced immediately on the transfer, the value of such property, at the time of the conversion was the true measure of his liability, and not its value at the time of taking the account. Bump on Fraud. Conv. 593.

The result is, the decree must be affirmed.

STONE, J., not sitting.

[Ex parte Hodges.]

Ex parte* Benj. F. Hodges.Mandamus.*

1. *On a change of venue, the court must select the county.*—It concerns the public as well as individuals that all trials for offences shall be fair and impartial. On an application for a change of venue, the court must decide what is the nearest county free from objection.

BEFORE the Supreme Court.

THE facts are stated in the opinion.

ELLIS & MARTIN, for the petitioner.

MANNING, J. — Petitioner having been indicted for murder in Etowah county, made application for a change of venue—upon affidavit that he could not, for reasons set forth, obtain a fair and impartial trial in that county. He added to his affidavit the words: “St. Clair county is not free from like exceptions.” The two other counties whose court-houses are nearest to that of Etowah, are Calhoun and Cherokee; that of Calhoun being nearer by about a mile. But the court was informed by affidavit that the State could not obtain a fair trial in Calhoun county. Whereupon it was ordered that the cause be removed for trial to the Circuit Court of Cherokee. To this ruling petitioner excepted, and prays this court by writ of *mandamus*, to order that the cause be removed into the Circuit Court of Calhoun county.

It concerns the public of the State as well as individuals that all prosecutions shall be fair and impartial without injustice or prejudice to either party. A judge who did not so exercise his office as to endeavor to produce this effect, would fail in his duty. The law says the trial must be removed to the nearest county free from exception; that is, free from obstacles to a fair and impartial trial. It is left to the judge to whom the application is made to decide what is the nearest county free from such an exception.

The writ of *mandamus* is refused.

[Wilkinson v. Ketler.]

Wilkinson v. Ketler.*Detinue.*

1. *An amendment or revision of a statute repeals the former law.*—When a statute is revised or amended, the original statute is repealed, although the amendatory act may not contain a repealing clause.

2. *An amendment, containing the section amended, is constitutional.*—An amendatory statute which contains the act, or section as amended, complies with the requirements of the constitution.

3. *Damages caused by imperfect cultivation will not support an attachment for rent.*—Damages caused by the imperfect cultivation of rented land, can not be ascertained by calculation, or be the subject of an affidavit. Consequently they will not support an attachment for rent, or justify a landlord's possession of the crop, against an older mortgagee whose mortgage has been duly recorded.

APPEAL from the Circuit Court of Butler.

Tried before the Hon JOHN K. HENRY.

William W. Wilkinson instituted in the Circuit Court of Butler county an action of detinue against Ann Ketler to recover two bales of cotton and one hundred bushels of corn. The defendant pleaded the general issue, with leave to give in evidence any matter that might be specially pleaded.

On the trial, the plaintiff introduced in evidence an agreement for the delivery of three bales of lint cotton, of five hundred pounds each, executed by one March Cook, "for advances with which to make a crop" in 1875. He also read in evidence a mortgage executed on the same day, April 10th, 1875, by the said Cook, conveying to the plaintiff two horses, one wagon, "twelve head of hogs, and all" his "crop for the present year, 1875." This mortgage was also made to secure the payment of money, necessary stock and provisions, advanced to enable the mortgagor to make a crop.

Evidence was also introduced by the plaintiff which tended "to show that the cotton seized was raised by March Cook on the land of the defendant, during the year 1875, as her tenant, and was delivered to her by him after it was gathered, and was in her possession at the time of the levy of the complaint." The weight and value of the cotton, and that the plaintiff had made advances under the mortgages, were proven.

The defendant, in her own behalf, was examined by written

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interrogatories, and deposed that she rented land in 1875 to March Cook, and also advanced him money, supplies and farming implements, to the value of one hundred and sixty-four 14-100 dollars, to enable him to make a crop—that March Cook agreed to cultivate for her ten acres in cotton and eight acres in corn, and to “gather the crop in good order and in due time,” for the use of the forty-seven acres leased by her to him for the year 1875. She testified that she had received from her tenant one hundred and seventeen 66-100 dollars in corn and cotton, exclusive of the bale in controversy, and that there still remained due forty-six 54-100 dollars; and that the crop was placed in her possession, according to contract, by the voluntary act of March Cook, who was sick and unable “to cultivate the land according to contract.”

The defendant offered testimony tending to show “that if the crop on the eighteen acres had been well worked, it would at least have made one bale of cotton more in 1875 than it did make.” To this evidence the plaintiff objected, but the court overruled the objection, and the plaintiff excepted. “But in the general charge, the court instructed the jury that a failure to cultivate the eighteen or twenty acres of land well, as required by the contract, would have been a breach of the contract, and would not be allowed the defendant in this action as an item of rent.”

The evidence also tended to show that the crop of March Cook was voluntarily delivered to the defendant, after the same was gathered, for her to sell and pay herself for the advances made by her. It was also shown that the plaintiff knew that March Cook was cultivating the land of the defendant as her tenant.

The court, among other matters, charged the jury: “But for the amount of advances the defendant had furnished to her tenant, Cook, as landlord, and which were not paid for, which are necessary and proper advances with which to make the crop, the defendant being shown to be the landlord, had a lien on the crop superior to that of the plaintiff under his lien note or mortgage.” To this part of the charge, the plaintiff excepted.

The plaintiff then asked a series of written charges. Some were given and others were refused. To the refusal of the court a general exception was reserved. Among the charges asked by the plaintiff, and refused by the court, are the following, viz.:

1st. “The court charges the jury, that if they believe from the evidence that the contract between Mrs. Ketler and

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March Cook was, that he was to cultivate eighteen or twenty acres for the rent of her land, then the rent of the land was what it was worth in money to cultivate the eighteen or twenty acres.

2d. "That it is necessary for her to prove the value of the rent, or what it was worth in money to cultivate the eighteen or twenty acres, to give her lien as landlord.

6th. "The court charges the jury, that if they believe any portion of the advances made by Mrs. Ketler to March Cook was advanced to him to cultivate the land, the entire product of which she was to receive, then she is not entitled to a lien for that portion of advances made.

7th. "That if the advances were made generally, and were advanced and used by March Cook in the cultivation of the land rented, and also of her own crop, and the jury can not discriminate from the testimony between the advances, then they can not allow her for any advances."

WATTS & SONS, for appellant.—1. The landlord's lien is a creature of the statute, and is limited by it.—Code, §§ 2961, 2962. No lien is given when the amount or thing to be received as compensation for the lease is labor, or the crop to be worked and made on land not rented by the tenant.

2. The act of March 8th, 1871, (Acts 1870–1, p. 19), only gives a lien for advances made by the landlord in such cases as he may have an attachment for rent.—17 Ala. 362; 26 Ala. 212.

3. The admission of evidence as to what the eighteen acres would have produced if well cultivated, was clear error, and as to this, the only question is, whether it was cured by the general charge. The well established rule is, that injury is always presumed from error, and unless the record shows no injury could have resulted from error, it will cause a reversal. 12 Ala. 823; 14 ib. 681; 42 ib. 74; 1 Brick. Dig. p. 809, §§ 89, 90.

4. As to whether the contract of Mrs. Ketler was such a contract as created the relation of landlord and tenant, contemplated by the statute, we refer to 1 Hill (N. Y.) 234; Taylor's Land. & Ten. § 561, and notes; 9 Wend. 302; 2 Cow. 652; 3 Blackf. (Ind.) 264. If this be not so, we submit that act giving lien to landlords for advances was repealed by the act of 18th March, 1875.—Acts 1874–5, pp. 254, 255. When any section of the Code is amended, the section, *ipso facto*, is repealed.—See Const. 1868, Art. IV, § 2. The act of 1875 amends the section which gave the lien to the land-

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lord, and repealed it. A lien granted by law can always be repealed by law.—28 Ala. The mortgage of Wilkinson gave him a superior right to the crop of Cook, and Mrs. Ketler had no lien on the crop for advances, and the charge of the court allowing her a lien for advances, was therefore erroneous.

GAMBLE & BOLLING, for appellee.

STONE, J.—Section 2961 of the Revised Code declares a lien in favor of the landlord, on the crop grown on rented land, for rent for the current year, and provides a remedy by attachment for its enforcement. This section was amended, and the old section as found in the Revised Code repealed, by the act approved March 8, 1871—Pamph. Acts 19—which, in lieu of said section, enacts that “a landlord has a lien on the crop grown on rented lands, superior to all other liens, for rent on, and advances made, to assist or aid in the cultivation of said land for the current year, and is entitled to the process of attachment for the recovery of the same, to be issued by any one of the officers named in section two thousand nine hundred and twenty-nine, in the following cases, whether the rent or advances made as aforesaid be due or not at the time the attachment is sued out; first, when the tenant is about to remove the crop from the premises, without paying the rent and said advances; second, when he has removed it, or any portion thereof, without the consent of the landlord.” We say this enactment repealed the section of the Code amended, for such is the effect of an amendment thus made, whether the amending statute contains a repealing clause or not. The constitution affects the repeal. Constitution of 1868, art. 4, section 2.

The act approved March 18, 1875, Pamph. Acts, 254–5, after reciting section 2961 of the Revised Code, as it stood originally, without noticing the amendment made by the act of March 8, 1871, declares that said section “be so amended as to read:

“§ 2961 (2533). A landlord, his assignee, or other *bona fide* owner of the amount due for rent, has a lien on the crop grown on rented land for rent for the current year, and is entitled to process of attachment for the recovery of the same, to be issued by any one of the officers named in section 2929 (2505), in the following cases, whether the rent is due or not at the time the attachment is sued out:

1. “When the tenant is about to remove the crop from the premises without paying the rent.

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2. "When he has removed it, or any portion thereof, without the consent of the landlord."

The statute then amends section 2962, so as to make it correspond with section 2961, as amended above, and contains the following repealing clause :

"That sections two thousand nine hundred and sixty-one, and two thousand nine hundred and sixty-two, as they are now in the Revised Code, be and the same are hereby repealed."

The question arises, what effect has the act of March 18, 1875, on the act of March 8, 1871? Were these several statutes enacted constitutionally?

The constitution of 1868, art. 4, sec. 2, ordains that "no law shall be revised or amended unless the new act contain the entire act revised, or the section or sections amended; and the section or sections so amended shall be repealed." What is meant by the language, *unless the new act contain the entire act revised, or the section or sections amended?* Must it contain the entire act, or section or sections, as they stood before the amendment, or is it sufficient if the act contain the act or section as amended? On reason, and on the weight of authority, we hold that the latter method conforms to all the requirements of the constitution. It avoids all danger of error, confusion, imperfection or incongruity of expression, and possible imposition, which the constitutional requirement was intended to prevent.—See *Cooley Cons. Lim.* 151; *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9.

We hold that each of the statutes above copied was constitutionally enacted, and that the reference and repealing clause in the act of 1875, to section 2961 of the Revised Code, must be referred to that section, as amended by the act of March 8, 1871; and the result is a repeal of the last named act.—See *Blake v. Brackett*, 47 Maine, 28. This repeal left the landlord without statutory lien for advances made, after March, 1875.

We regret this result, and think it proceeded from an oversight. Still, the repeal was effected in strict conformity with the provisions of the constitution copied above, and we are not permitted to disregard it. The mischief was healed by the act approved February 9, 1877.—Code of 1876, § 3467 *et seq.* Still, it leaves a gap of nearly two years when there was no such lien for advances.

That part of the affirmative charge of the court which was excepted to, being that part which commences with the

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words, "But for the amount of advances defendant had furnished," is not reconcilable with the views we have expressed above, and must work a reversal of this case.

The charge of the court took from the jury all right to consider the evidence that the tenant Cook did not faithfully perform his contract and obligation to pay rent, by cultivating other lands of the landlord; and hence, no injury was done to plaintiff by allowing that evidence to go to the jury. The charge, in effect, ruled the evidence out.

The complaint of defendant, in the present case, was not that her tenant had not done labor, which his contract bound him to perform, in payment of his rent. If it had been that, it is probable attachment for its collection, the other conditions being present, would have lain in her favor.—See Taylor, Landlord and Tenant, §§ 561-2; *Camell v. Lamb*, 2 Cow. 652; *Valentine v. Jackson*, 9 Wend. 302; *Smith v. Cahon*, 10 Johns. 91. The complaint is that the crop was not well cultivated, and that the landlord was damaged by reason that it did not yield as much as it would have yielded, if well cultivated. These damages are not capable of being reduced to a certainty by calculation; could not be the subject of an affidavit, "that the amount claimed is or will be due for rent," and consequently they will not support an attachment for rent or justify the landlord, obtaining possession of the crop, to defend that possession against an older mortgagee of the crop, whose mortgage had been duly recorded.

The exception to the court's refusal to give the several charges asked, was general. Some of them should not have been given. Notably, charges 6 and 7; for there is nothing in the record to show there was any evidence on which to base them.

For the error above pointed out, the judgment of the Circuit Court is reversed, and the cause remanded.

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Redemption of Land.

1. *The levy of an attachment on land creates a paramount lien.*—The levy of an attachment on land creates a lien which is paramount to any subsequent charge, or alienation caused either by the operation of law, or the act of the defendant.

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2. *The land may be alienated, subject to the lien.*—The power of the debtor to charge or alienate the property, in subordination to the lien, is ample and complete. The lien necessarily takes effect from the day of the levy.

3. *The mortgagee is a trustee for the mortgagor.*—A mortgagee although clothed with the legal title is in a large sense a trustee for the mortgagor. To protect his rights he can remove prior incumbrances, but neither the mortgagor, nor any one else, can redeem without compensating the mortgagee.

4. *A creditor claiming the right to redeem must pay all lawful charges.*—A creditor claiming the right to redeem from him, must not only pay the sum bid at the sheriff's sale, with ten per cent. per annum thereon, but must also pay the mortgagee's debts, which are in the words of the statute, "lawful charges."

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

The facts are contained in the opinion.

ELMORE & GUNTER, for appellant.—1. It is admitted by our own courts that a mortgagee may acquire and enforce against mortgaged premises a judgment lien for a distinct demand.—14 Ala. 483. And when such lien is prior to mortgage, it vests in the purchaser the whole title, subject to redemption.—27 Ala. 197; 37 Ala. 354. When a superior lien is enforced against property, the subordinate ones are destroyed, and the property is subject to redemption clear of such subordinate liens.—11 Ill. 445; 13 Ill. 398; 51 Ala. —.

2. No objection to the right of redemption can be urged other than those made at the time the offer to redeem is made. None were then mentioned.—25 Ala. 393. In this case the tender was properly made, and being rejected, and the proposed credit entered on a subsisting judgment, the complainant was really invested with the title.—*Lockett v. Hurt*, (in manuscript.)

3. It is insisted as a plain proposition that a purchaser must at all times be prepared to say whether he will accept, reject or respond to an offer of redemption.—39 Ala. 298.

4. Taxes accruing during the term of occupation are not enumerated among the charges allowed, nor do they add value to the estate, passing to the redeeming creditor.—14 Ala. 622. The purchaser is entitled to rents and profits till a tender—27 Ala. 193—and taxes levied are personal charges against him. The complainant has no right to claim the surrender of tax-titles held by appellee.—27 Ala. 455.

5. The only correct mode of reasoning concerning distinct rights united in the same person, is to contemplate and estimate the several rights as held by different persons. The

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application of this plain rule relieves the case of complication.—Code, § 2955; 27 Ala. 193. There is no inconsistency in a person having a mortgage upon property for one debt acquiring another debt having a prior lien, and enforcing the latter.—14 Ala. 483.

6. If there be a merger between the equity of redemption purchased and a mortgage held by the purchaser, the rule is that the mortgage is extinguished.—1 Hill. on Mort. 329–30; ib. 338–40; 8 Metc. 290; 3 Powell on Mort. 1029, n. 1; 2 ib. p. 557a. A man may have two mortgages or two liens of any kind against land, and they may not merge, but when the paramount lien is made productive, the purchaser takes an absolute title, except as to the right of redemption. The sale is an extinction of both liens.—1 Ala. 728; Crocker on Sher. p. 251. The lien given by one execution and by levy of an attachment stand as judgment liens under English statutes.—2 Pow. on Mort. 558; 7 Bac. Ab. 101; 1 Sim. 344.

7. What is the law? We say that there is no policy or rule of the law which interdicts the mortgagee from buying a distinct debt with a superior lien, and enforcing it. We have argued this and cited a few authorities. The appellee has furnished no authority that even tends to the contrary, and none can be found.—2 Wash. Real Prop. p. 180 *et seq.*; 2 Spence Eq. Jur. 308–344 *et seq.*; 38 Ala. 629–30; 18 Ves. 384; 3 Pow. on Mort. 1088b.; 8 Ala. 876; 34 Ala. 91; 38 Ala. 345; 29 Ala. 703; 14 Ala. 483–514; 1 Hill. on Mort. 338 *et seq.*; Miller Law of Eq. Mort. 65; Coote on Mort. 394; 20 Wis. 576–85; 31 N. Y. 411; 6 Fla. Reps. 711; 7 Ired. Eq. 292.

DAVID CLOPTON, for appellee.—1. A creditor seeking to redeem can not apply in the first instance to a court of equity. The right to redeem is not perfect till all the statutory requirements have been performed, or a valid excuse for their non-performance, without fault on the part of the complainant.—27 Ala. 193–7.

2. Without any agreement as to time, Banks would have been entitled to reasonable time within which to ascertain the amounts he should be paid, and the value of permanent improvements.—25 Ala. 393–407; 30 Mich. 149. Section 2513 of the Revised Code naturally divides itself into two clauses: the former specifying the terms upon which a right of redemption is acquired, and the latter specifying the prerequisites to the vesting of title in the party redeeming, and to the execution of a conveyance to him.—35 Ala. 701. An

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act necessary to give equity to a bill when subsequently performed, can not impart equity to a bill previously filed.—30 Ala. 330-4. Therefore, the appellee having accepted the offer, and the credit not having been actually given until after the bill was filed, the bill was without equity, and should have been dismissed.

3. A creditor proposing to redeem, must pay all lawful charges. The term, charge, has various significations.—1 Bouvier's Dict. 223. A mortgage is a charge on the property mortgaged.—33 Ala. 534-557. In the construction of a statute the legislature is presumed to use words in their proper signification, unless the contrary appears.—18 Ala. 276. Hence, the mortgages held by Banks, and the amounts paid by him to redeem the lands from tax sales were lawful charges which the appellant was bound to pay in order to redeem.—25 Ala. 393-407; 23 Barb. 490-7.

4. A statute may be extended or restrained by an equitable construction.—6 Port. 109. In the construction of a statute courts are often required to look less at the words than at the subject-matter—the consequences and effects, the reason and the spirit of the law.—20 Ala. 54-62; 1 Black. 55-61. A statute should be so construed as not to work injustice, and in its relations to other statutes indicating the policy of the statute.—1 Dev. & Bat. Law Rep. 52; 14 Ala. 476-81. Under the statute as it formerly existed, a plaintiff in execution would have the benefit of a deed of trust on paying off the debts secured by it.—2 Port. 315-22; 21 Ala. 288-293. This has been changed in some respects by the Revised Code, § 1611.

5. To permit appellant to redeem on terms offered in her bill would be assisting her to deprive the appellee of the security he had in the mortgages.—14 Ala. 733-37. After the law-day of the mortgages the legal estate vested absolutely in Banks. The mortgagor had nothing but an equity of redemption.—37 Ala. 354-358; 54 Ala. 309. It is a legal solecism to say a person can buy from himself his own property. Nothing passes by such a transaction.—6 Ala. 204-208.

6. An execution or the levy of an attachment does not give the plaintiff any right to or in the land of the defendant. It is a mere lien, a right to enforce the collection of the debt out of the property.—9 Ala. 656; 9 Ala. 114. The mortgagor had the right, before the sale, to redeem by paying the mortgage and the amount which Banks paid to procure the judgment, and he had the same right after the sale.

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37 Ala. 358. A mortgagor can not be stripped of his right to redeem by a sale of the mortgaged property to pay the debt secured by it.—37 Ala. 358.

7. No merger can take place unless two estates—a greater and a lesser—meet in the same person. But there are exceptions to this rule. If the owner has an interest in keeping these titles distinct, he has the right to do so.—1 Allen, 240-2; 8 Metc. 517. When the mortgage and equity of redemption become vested in the same owner, the mortgage will be extinguished or not, according to his intention, and in the absence of positive evidence of this intention will be presumed to correspond with his interest.—8 R. I. 548-53; 7 Greenl. 377; 18 Ves. 384; 34 N. H. 90-94.

BRICKELL, C. J.—The bill was filed by the appellant, for the purpose of compelling a redemption of lands sold at sheriff's sale under execution as the property of one Fleming M. Gilmer, and purchased by the appellee. The material facts shown by the pleadings and proofs, are, that on the 18th day of December, 1874, the appellant recovered a judgment in the Circuit Court of Montgomery county against said Gilmer, for the sum of three thousand dollars.* The judgment was rendered in a suit commenced by attachment, a levy of the writ on the lands in controversy, having been made on the 23d day of June, 1873. Prior to that time, Holmes & Goldthwaite had caused an attachment to issue against said Gilmer, which on the 27th day of November, 1871, was levied on said land. On the 30th day of January, 1873, they obtained judgment in said suit, and on the 16th day of June following, under an execution issuing on the judgment, the lands were sold, and appellee became the purchaser, receiving a conveyance from the sheriff. After the levy of the attachment of Holmes & Goldthwaite, but before the issue and levy of the attachment of the appellant, Gilmer by his duly authorized attorney, had executed several mortgages by which the lands were conveyed to the appellee as security for debts owing him by said Gilmer. Before the sheriff's sale, the appellee had become the owner of the judgment of Holmes & Goldthwaite. The appellant claims she is entitled to redeem the lands, on paying the appellee the amount bid by him at the sheriff's sale, with ten per cent. interest thereon, and that she is not bound to pay the mortgage debt, and this is the controlling question the case presents.

The statute under which the right of redemption is claimed,

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provides that where real estate, or any interest therein, is sold under execution, or by virtue of any decree in chancery, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor from the purchaser, or his vendee, within two years thereafter, on the payment or tender of the purchase-money, with ten per cent. per annum thereon, *and all other lawful charges*. A subsequent section, confers on judgment creditors, a like right of redemption, on the payment or tender of the amount bid for the land, ten per cent. per annum thereon, *together with all lawful charges*, and on offering to credit the debtor, upon a subsisting judgment with an additional sum, not less than ten per cent. on the original purchase-money.—Code of 1876, §§ 2877–89.

The levy of the attachment at the suit of Holmes & Goldthwaite, by the express words of the statute, created a lien on the lands for the satisfaction of the judgment the plaintiffs therein might obtain subsequently.—Code of 1876, § 3280. The lien was continuing and operative, paramount to any subsequent charge or alienation, which could arise by operation of law, or from the act of the defendant in attachment. *Randolph v. Carlton*, 8 Ala. 617. It was not however property, or a right of property—not strictly speaking a *jus in re*, or a *jus ad rem*, but a bare legal right, by due course of legal proceeding, on obtaining judgment, to charge the lands with its payment, in priority of all charges or alienations subsequent in point of time.—2 Story's Eq. §§ 1215–16; Freeman on Judgments, § 338. The lands remained liable to be levied on at the instance of any other creditor either by attachment, or under an execution issuing on a subsequent judgment. The power of the debtor to charge, or to alienate them, in subordination to the lien, was full and complete. The only restraint on the power, was that by its exercise the priority of lien created by the levy, could not be displaced or diminished, and whoever succeeded to the estate of the debtor, or acquired a charge on it, must take the estate *cum onere*. The subsequent mortgages to the appellee were valid and operative conveyances, transferring the legal estate in the premises, subject to the prior lien.—*Conard v. Atlantic Ins. Co.* 1 Pet. 445; *Addison v. Crow*, 5 Dana, 279; *Fitzgerald v. Bebee*, 2 Eng. (Ark.) 319; 1 Hill. Mort. 298; *Drake on Attachment*, §§ 222, 239; *Warner v. Everett*, 7 B. Monroe, 262.

The lien of necessity takes effect from the day of the levy. When the judgment was obtained, execution issued, and a sale made by the sheriff, the title of the purchaser had rela-

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tion to the day of the levy, and is paramount to that created by the mortgages.—*Randolph v. Carlton, supra*; *Perkins v. Reed*, 14 Ala. 231. The appellee, a mortgagee, had a clear legal right to disengage the premises from the prior incumbrance created by the levy of the attachment.—1 Story's Eq. § 1023; 3 Barb. 534; *Averill v. Taylor*, 4 Seld. 44; *Page v. Foster*, 7 N. H. 392; *Silver Lake Bank v. North*, 4 Johns. Ch. 370. His own safety, and the security of his debts, the full and free operation of the title the mortgages conveyed, would be thereby increased. A mortgagee, though clothed with the legal estate, is, in a large sense a trustee for the mortgagor. The only effect of his removal of prior incumbrances on the mortgaged premises, is, that he holds them in trust for the mortgagor, without acquiring thereby any right superior or adverse to that of the mortgagor, when he comes to redeem. Without compensation to the mortgagee, he will not be permitted to redeem.—*Arnold v. Foot*, 7 B. Mon. 66; *Cullom v. Erwin*, 4 Ala. 452. The purchase by the appellant at sheriff's sale, had no other effect than to remove the lien of attachment as a charge or encumbrance on the premises—it clothed him with no other right or interest than that of demanding compensation for the moneys properly expended in its removal. Though in a court of law, it may have clothed him with an estate in the premises, superior to that created by the mortgage, in a court of equity, he holds that estate as a trustee for the mortgagor, without right to derive from it any personal benefit, or a title antagonistic to that of the mortgagor.

A creditor claiming redemption from him, must therefore pay not only the sum he may have bid at the sheriff's sale, with ten per cent. per annum thereon, but must also pay the mortgagee's debts, which are in the words of the statute *lawful charges*. The word *charge*, is of very large signification, and in the statute its proper signification is, every lien, or incumbrance, or claim the purchaser may have upon the premises, and for which at law or in equity, he would be entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them.—*Couthway v. Berghaus*, 25 Ala. 393. An attachment, or an execution at law, may be levied on real estate in which the defendant has an absolute, or qualified legal estate, or a perfect equity, having paid the purchase-money, or in which he has an equity of redemption. If the levy is on a perfect equity, and the purchaser is put to expense in acquiring the legal title, there would be no doubt of his right to demand reimburse-

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ment of such expense, as a *lawful charge*. Or if it was an equity of redemption, and he discharged, as he had the legal right to do, the mortgage, his right to reimbursement as a *lawful charge*, would be undoubted. So, if he acquires the legal estate, and in his hands it stands simply as a security, whoever claims redemption must discharge the security. It is a principle too well settled, to be matter of controversy, and of very general, if not universal application, that a party fairly acquiring the legal estate, will not be compelled to part with it, until all charges or claims thereon, to which he is entitled in law or equity, are satisfied.—*Mitchell v. Brown*, 6 Cald. 505.

It is not necessary to consider any other question the record presents. There was no offer by the appellant either at the time redemption was claimed, or in the bill, to pay the mortgage debts, and without such offer she is not entitled to relief.

Let the decree of the chancellor be affirmed.

STONE, J., not sitting.

MANNING, J.—To the views of the Chief-Justice I add another.

The land in controversy was mortgaged in 1872, by the owner, one Gilmer, to secure payment of divers sums of money amounting to several thousand dollars, which he owed to appellee Banks. Taxes also had accrued, some of them for the years 1869, 1871 and 1872 against the land; and portions of it had from time to time before his purchase at the sheriff's sale, been sold by the tax-collector to other persons for the taxes. Banks finding the title incumbered thereby, bought from these vendees, respectively, the interests they had thus acquired. The sums paid to them, severally, were not large; and there is no evidence of fraud, or collusion, or of any improvidence in thus disencumbering the title, without litigation with the purchasers at the tax-sales.

For the same purpose of fortifying his title—Banks bought the judgment of Holmes & Goldthwaite with its older lien created by their attachment, and under it, caused the land to be sold, and became the purchaser of it; after which he bought it again for a sum of over \$4,000 more, at a sale made under the mortgages to himself. The liens under which these several purchases were made, are not shown to have been invalid, and were all created long before appellant, Mrs. Grigg, obtained her judgment, or brought the suit in which it was rendered.

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Yet, because the title derived through the attachment, judgment and sheriff's deed in the suit of Holmes & Goldthwaite against Gilmer, supported by a lien older than that of the mortgages, is thought to be unassailable, and in a conflict between it and the other, that title would probably prevail, appellant proposed—and her counsel strenuously insist that it is her right as a judgment creditor of Gilmer, under the redemption act, to purchase and have that particular title only, and no other,—by repaying to Banks the small amount he bid for it—with interest at ten per cent. a year, and by entering a credit of \$2,500 on the judgment in her own favor, against the insolvent debtor, Gilmer, and by paying, under the denomination of “all lawful charges,” any other expenses incurred by Banks in obtaining that title, or in making permanent improvements on the land. She distinctly repudiated all obligation or purpose to pay any of the mortgage debt to him, or to repay any of the money which he had in good faith expended in buying in the tax-titles.

It is clear, that if instead of having the land sold under the judgment and mortgages both,—Banks had merely entered satisfaction of the judgment, and had caused the land to be sold and had purchased it under the mortgages only, appellant, before she could redeem as a judgment creditor under the statute, from him, would have had to reimburse to him, as a part of the “lawful charges,” what the judgment of Holmes & Goldthwaite, an incumbrance on his title as mortgagee had cost him; and that he could also have interposed and required her to pay the entire mortgage debt. This is not disputed. But simply because—while he was owner of all these securities—Banks, according to the assumption of appellant's counsel, so unskillfully (not fraudulently) availed himself of them, as to have the land sold under them all and to become the purchaser at such sales, instead of discharging that one, the lien of which was the oldest, and buying under the mortgages only,—it is contended that a court of equity should hold that he had forfeited or wholly deprived himself of all benefit from his mortgages. The fallacy of the argument is apparent upon the mere statement of it. What could a court of equity do that would be more inequitable?

If appellant had sued for the land as the statute in a proper case authorizes, at law, a court of chancery would be constrained, it seems to me, by its rules and principles, to interfere and enjoin the proceeding. It has the power, and will exercise it, when necessary, to correct blunders of the nature

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of those imputed to Banks, and to save from the consequences of them.—*Stover v. Herrington, et al.* 7 Ala. 143; 1 Story's Eq., (12th ed.) §§ 99, 138e, 138f, 167. These are not mistakes occurring in or affecting any contract, or through which any injury resulted to Mrs. Grigg.

Certainly, nothing could be more contrary to some of the universally accepted and best established maxims of equity law, than for a court of equity to interfere, in a case like the present, to set aside the legal rights, and superior equities, of a party in possession, and elevate above them a claim resting upon considerations which must be regarded as very much less meritorious. This, of course, does not refer to the claim of Mrs. Grigg against Gilmer,—but to the contention between her and Banks.

I concur in the decree of affirmance.

Kingsbury v. Yniestra, Adm'r.

Foreign Judgment.

1. *Record of judgment; how may be contradicted.*—The record of a judgment rendered in a sister State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such do not exist, the record will be a nullity notwithstanding it may recite that they did.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

The facts sufficiently appear in the opinion.

WATTS & WATTS, for appellant.—1. The main question presented is, whether the defendant had the right to plead and prove that he had no notice of the suit in Florida, and that he never appeared in person or by attorney, and that the persons pretending to act for him as attorneys in Florida had no authority to appear for him. It is admitted that the decisions in the State courts on this subject are contradictory. But the Supreme Court of the United States, in the case of *Thompson v. Whitman*, 18 Wall. 457, held after an elaborate discussion of the question that in a suit upon a judgment rendered in another State, the defendant could plead and prove any matter which showed the court had no jurisdiction of the person of the defendant or of the subject-matter.

[State, ex rel. Harrell, v. M. & M. Railway Co.]

HERBERT & BUELL, for appellee.

MANNING, J.—The principal question presented in the cause, is whether or not a defendant sued here upon a judgment recovered against him in a court of record in another State, in which it is recited that he was served with process, or appears by attorney, may controvert such recital and allege and show that he was not served with process, was not in any manner brought into court, had not submitted himself to its jurisdiction, or appeared therein, by attorney, or otherwise. The question arises under the clause in the Constitution of the United States which declares that—"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," and the act of Congress passed to prescribe the manner in which such judicial proceedings shall be proved and the effect thereof. It consequently belongs to the Supreme Court of the United States definitely to determine what are the rights and duties of parties in suits to which these constitutional and statutory provisions relate; and that court, after a review of the cases and consideration of the law on the subject, a few years ago, in an elaborate opinion, announced its conclusion. It held that "the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist."—*Thompson v. Whitman*, 18 Wall. 457.

This adjudication we adopt as the law in such cases in the courts of this State, and as the ruling of the circuit judge in the cause before us, was not in harmony with it,—the judgment of the Circuit Court is reversed and the cause remanded.

State, *ex rel.* Harrell, v. The Mobile and Montgomery Railway Company.

Mandamus.

1. *An application for a writ of mandamus must state specifically what is required.*—*Mandamus* commands the performance of specific acts; and if not performed as ordered, the court treats the refusal as a contempt and punishes the disobedience as such—consequently, the party commanded

[*St. te, ex. rel. Harrell, v. M. & M. Railway Co.*]

must be informed what he is required to do in terms so specific that he can know the precise duty exacted of him.

2. *The averment in such an application must be certain.*—An averment in a petition for a *mandamus* that the relator tendered “bales of lint cotton,” without specifying the number of bales is indefinite and fatally defective. The number of bales should have been so stated that the court could have ordered the railway to do a specific thing.

3. *When another remedy exists, a mandamus will not be granted.*—Section 1698 of the Code of 1876, affords ample, if not generous redress to every one who suffers from excessive charges by a railroad company, and consequently, under the authorities, the *mandamus* in this case must be denied.

APPEAL from the Circuit Court of Butler.

Tried before the Hon JOHN K. HENRY.

The facts are contained in the opinion.

L. D. BROOKS, for petitioner.—1. If the mandate of the court, as was strongly intimated, must be limited necessarily to some particularly described article of freight, and can not be extended to the performance of a continuous like duty to appellants as a remedy in this class of cases, it is simply worthless, and I think contrary to the fundamental principles established in the following cases:—29 Conn. 538; 2 Barn. & Ald. 644; 1 Otto, 91; 5 Heisk. (Tenn.) 125; 37 Ind. 489; 3 Harr. 312; High, Ex. Rem. §§ 315–17, 319–20 and 22.

2. What remedy will bar the right to relief by *mandamus*? High, Ex. Rem. §§ 17, 18, 35, 210 and 415; 19 Mich. 392; 82 Penn. 275; 24 Mich. 468; 29 Ill. 421–22; 45 Mo. 294.

3. Is the existence of a statute for the enforcement of a right by any specified remedy, a bar to any other remedy for its enforcement, as applied to extraordinary remedies? The very reverse is the rule when the remedy provided is inadequate by reason of the necessity of a multiplicity of suits, if the remedy under the statute is pursued, or for any other reason.—High, Ex. Rem. §§ 5, 6; 9 Johns. 506.

STONE, J.—The grievance complained of in the present petition is, that the Mobile and Montgomery Railway Company refused to transport local freight, tendered by the relator, at a rate of fifty per cent. more than the rate charged for transporting the same description of freight over the whole line of its road. See act “regulating the charges for transportation of freight upon railroads within this State,” approved April 19th, 1873—Pamp. Acts, page 62. The complaint charges “that relator tendered respondent at its depot in the city of Greenville, bales of lint cotton for transportation to the city of Mobile, and at the same time of said

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tender, relator also tendered and offered to pay respondent one and 45-100 dollars per bale for the transportation of the same as aforesaid." The petition had previously shown the price or rate charged by said railway company for transportation of bales of lint cotton over the whole line of its railway, and that the sum tendered was at the rate of fifty per cent. more, for transporting cotton from Greenville to Mobile; such transportation being conceded to be local freight.

The averment in the petition, that relator tendered "bales of lint cotton," without specifying the number of bales, is fatally indefinite and defective. The number of bales should have been specified, so that the court, in awarding the writ, could have commanded the railway company to do a specific thing. *Mandamus* is "directed to any natural person, corporation, or inferior court of judicature within its jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty."—3 Black. Com. 110; Bouv. Law Dict. The averment in the present petition is so indefinite that the court could not require the corporation to do a *particular thing*. *Mandamus* compels the performance of specific acts; and, if not performed as ordered, the court treats the refusal as a contempt, and punishes the disobedience as such. The party commanded must be informed what he is required to do, in terms so specific, that he can know the precise duty required of him, and the extent of it; and the court must be able to determine with certainty, when its mandate is obeyed, or disregarded. An order to receive and transport *bales of cotton*, without specifying any number, could be easily evaded, and would be too indeterminate as a rule of action, or predicate of judicial proceeding.

We feel it our duty, however, to determine the more important question of the relator's right to *mandamus*, if the petition were correct, and sufficiently specified the duty it avers the railway company disregarded.

We have been referred to several adjudged cases, which are relied on in support of the present proceeding. The one nearest in point is *Mobile and Ohio Railroad Company v. Wisdam*, 5 Heisk. 125. In that case the right asserted is not distinguishable from the one claimed in this case, if the relator's construction of our statute is the correct one. The duty claimed of the railroad in that case, was of a class with the duty demanded in the present proceeding. But they had no statute giving a specific remedy at law. An action on the case for the recovery of damages—the common law action—

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was the only remedy their law afforded him. Chief-Justice NICHOLSON, in delivering the opinion of the court, cited no authorities in support of his ruling, except the general doctrine on the subject of *mandamus*. Among other things he said, "in the case before us, the legal right is clear, the obligation created by the general statute, and the acceptance of its provisions and benefits by the company, is obvious, and the withholding of the right is illegal and unjust. It is equally obvious that there is no specific adequate remedy provided by the law which created the right and the obligation."

In another place he had said, "the company say, we are bound to receive your tax receipt for a ticket, but we choose to require you to pay the money, and you can sue us for damages for violating our contract; when you get your money, that will be equivalent to your tax receipt, and you can then buy a ticket to Mobile. It is far from being clear that the remedy by action for damages would be equivalent to a specific execution of the obligation. It might be that a judgment against the company would not be readily convertible into money."

The next case, most nearly akin to the present one, is that of *Chicago and Northwestern Railway Company v. People, ex rel. Hempstead*, 56 Ill. 365. That case presented features that were peculiar and unusual. It is manifest that for the injury there complained of, the law afforded no adequate redress, by any of its usual forms of action. In fact, the injured party could not have maintained any action, as we understand the facts. The wrong complained of was, that the defendant, railroad corporation refused to receive or transport grain that might be consigned to the grain-elevator owned by relator. The effect was to prevent consignments to him; and the extent to which this known regulation would deprive him of patronage could not be known. Hence, he had no adequate remedy at law, if indeed he had any remedy. If consignments had been made to him, and the railroad had, after receiving the freight, refused to deliver it according to its contract, express or implied, the relator—consignee—would have had an adequate remedy at law. That case and this are entirely dissimilar.

The other cases relied on are much less in point. They sought to redress a dereliction of duty—a disregard of an obligation to the public, in which the general public had an interest, while no one man had sustained a separate, individual injury, for which an action at law could be maintained.

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See *State v. Hartford and New Haven R. R. Co.* 29 Conn. 538; *The King v. S. & W. Railway Co.* 2 Barn. & Ald. 646; *Union Pac. R. R. Co. v. Hall*, 1 Otto, 343; *State v. Wil. Br. Co.* 3 Harrington, 312; *People, ex rel. v. State Im. Co.* 19 Mich. 392; *I. & C. R. R. Co. v. State, ex rel.* 37 Ind. 489; *State, ex rel. v. Treasurer, &c.* 45 Mo. 294.

The act of April 19th, 1873, referred to above, declares "that it shall not be lawful for any railroad company . . . to make any discrimination in the rates or charges for the transportation of freight," &c. It then provides that for the transportation of local freight, the railroad may "demand and receive not exceeding fifty per cent. more than the rate charged for the transportation of the same description of freight over the whole line of its road; and any railroad company, manager, agent or officer, violating the provisions hereof, shall be liable to the party injured thereby, in double the amount of the overcharge; but in no case shall the penalty be less than twenty dollars."

This statute furnishes a specific remedy for the wrong complained of, and affords ample, if not generous redress, to every one who suffers from excessive charges by the railroad. We think, with the circuit judge, that the remedy is adequate; and this, under all the authorities, forces us to deny the writ of *mandamus*.—2 Brick. Dig. 240, §§ 4, 5.

We can not assent to the argument that the fifty per cent. additional, which the statute allows the corporation to charge for transportation of local freight, means fifty per cent. on the charge over the whole line of the railroad, irrespective of the distance the local freight may be carried. The language of the statute forbids that construction. "Fifty per cent. more than the *rate* charged . . . over the whole line of its road," are the words of the statute. Rate is the emphatic word of the sentence. In this connection, it is employed in the sense of proportion—a standard of valuation; a rule, or measure of assessment. That is, an assessment according to a given standard. The charge for transportation over the whole line is so much, which is equivalent to so much per mile. Local freight must be carried at the same rate, *plus* fifty per cent. Thus, if the charge over the whole line be 100, the charge over half the line will be 50, plus 50 per cent.=25-100, added to 50, gives 75 as the result.

We are aware that this may operate very oppressively on the railway corporation, when the transportation is over a short section of the road. The remedy is not with us. It

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is worthy of consideration if the statute should not be modified, so as to graduate the compensation by the labor, delay and risk necessarily incurred, which are little less, when the freight is carried ten miles, than when it is carried four-fifths of the entire line.

The Circuit Judge did not err in refusing the *mandamus*, and his judgment is affirmed.

Hutchinson et al. v. Owen et al.

The Power of an Administrator over Choses in Action.

1. *An executor or administrator has the legal title to choses in action in his hands for administration.*—An executor or administrator possesses the legal title and has absolute power to transfer or dispose of *choses in action* in his hands for administration. No *bona fide* dealing with him in this regard can be impeached.

2. *The indiscretion of an administrator can not effect others fairly dealing with him.*—The indiscretion of an executor or administrator can not be visited on those who deal fairly with him.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. HURIOSCO AUSTILL.

In 1858, Haley Hutchinson, a resident citizen of Lowndes county, in the State of Alabama, died. He left “a large property, both real and personal;” but left neither a widow nor children. Soon after his death, Montgomery S. Relfe and William R. Powell obtained letters of administration from the Probate Court of Lowndes county, and administered upon his estate.

On the 13th of July, 1859, the said administrators filed a “petition in the said Probate Court of Lowndes county, praying for an order to sell the lands belonging to Haley Hutchinson in his life-time, on the ground that the same could not be equitably divided among his heirs;” and on the 5th of September, 1859, the Probate Court granted an order authorizing the sale of the land by the administrators. In pursuance of the said order, the administrators sold the said land on the first Monday of December, 1859, and “Lewis Owen became the purchaser thereof, at the price of thirty-five thousand four hundred and fifty-nine 66-100 dollars.” To secure the payment of this sum of money, the said Owen

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made a promissory note, with three sureties, payable on the first day of January, 1861, with interest from the first day of January, 1860. The sale of the land was duly reported by the administrators, and was confirmed by the Probate Court of Lowndes county on the 31st day of December, 1859.

The administrator received in payment of the said note from the said Lewis Owen, six thousand five hundred dollars, on the first day of May, 1862; on the 13th of June, 1862, thirteen thousand five hundred dollars; and on the 27th day of December, 1862, ten thousand dollars. These payments left, on the day last mentioned, a balance of thirteen thousand six hundred and seventy dollars still due.

In the month of March, 1863, the administrators of the estate transferred the promissory note made by Lewis Owen and his sureties to Henry B. Wigginton and Georgiana A. Shepherd, and received in payment of said sale and transfer of the promissory note, Confederate States treasury-notes of the nominal value of about fourteen thousand dollars. This was the only compensation received by the administrators for the sale and transfer of the said note. This disposition of the note was made "privately and without any order of the said Probate Court." The purchasers of the note knew that it was assets in the hands of the administrators of the said estate.

On the 24th day of October, 1863, the administrators reported to the Probate Court of Lowndes county that the whole of the purchase-money of the said land had been paid by said Lewis Owen; and on that day the said Probate Court rendered a decree on said report, authorizing and ordering the administrators to convey, by proper deed, to Lewis Owen all right, title and interest which said Haley Hutchinson had in said land at the time of his death. In pursuance of the decree, the conveyance of the land was made to Owen.

In 1871 William Hutchinson and Robert Hutchinson, who were nephews of the decedent, filed their bill of complaint in the Chancery Court of Lowndes county, against Lewis Owen and others. It contained the foregoing statement of facts, and charged that the said report made by the administrators of the estate to the Probate Court of Lowndes county, "did not speak the truth; that said decree rendered thereon was based alone upon said false report, and the said deed from Relfe and Powell to Lewis Owen was executed alone by virtue of said false report and the decree thereon, and that the whole transaction, commencing with the sale of the said note and followed by said report, decree and deed,

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was a fraud upon the rights of the complainants, and was illegal and void.

The complainants also averred, that they had never "authorized, sanctioned, ratified or confirmed said illegal transaction, or any part of it, from the sale of the note to the execution of the deed of conveyance in pursuance of the decree of the Probate Court of Lowndes county; and the said transaction was false and fraudulent." They alleged also, that the sum of thirteen thousand six hundred and seventy dollars, with interest thereon, from the 27th day of December, 1862, was still due on the said promissory note; and that the administration of the said estate had never been settled.

The complainants, among other things, prayed that the administration of the estate of said Haley Hutchinson be removed to the Chancery Court; "and that the report made by Relfe and Powell, that the purchase-money of said land had been paid in full, the decree of the Probate Court of Lowndes county, authorizing and ordering the said Relfe and Powell to execute a deed, conveying all the right, title and interest which the said Haley Hutchinson had in said land, at the time of his death, to Lewis Owen, and the deed or deeds, executed by the said Relfe and Powell, under said decree, be set aside, annulled and declared void and of no effect, so far as they affect the rights of the complainants; that an account be taken of the amount due and unpaid on said note at the time of the unauthorized and illegal sale thereof with interest thereon, and that the same be declared a lien on said land," &c.

The defendant, Owen, and A. G. McGehee, in their answer, "deny that said Lewis Owen was the sole purchaser of said lands; on the contrary, they aver that said lands were purchased jointly by said Lewis Owen, Albert G. McGehee, Elizabeth Harrison and Thomas H. Watts; and that for convenience and by agreement and arrangement the purchase was set down to Lewis Owen. The said note was a joint note of the four principal makers; and by agreement before the purchase was made, said lands were partitioned among the four purchasers, by lines then agreed on; said Owen bid and purchased for each and all of the parties on this agreement." The answer admitted "the payments alleged to have been made by Lewis Owen, but denied that they are the only payments made; on the contrary, it alleged that the whole amount of said note was paid to said Relfe and Powell; that nothing is due thereon, and that the said

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note was delivered up and surrendered by the said Relfe and Powell."

On the final hearing of the case, the court decreed that the complainants were not entitled to the relief prayed, and ordered that the bill of complaint should be dismissed.

H. C. SEMPLE, and R. M. WILLIAMSON, for appellant.—1. Had the administrators any title to this land? On the death of Hutchinson the title vested in the heirs. The administrators were merely naked trustees, with a naked power of sale under the order of the court for a single purpose, the distribution of the proceeds of sale among the heirs. Let us consider the power of administrator or executor over *choses in action* of testator or intestate. Whence is it derived? From the title and duty of collection for payment of debts and distribution, or in case of will, of legacies also. But even as to these, he is a *trustee*, and all who deal with him as such are affected by his character, and bound not to aid in defeating the performance of his duties. As to his power of sale of assets or *choses in action*, Lord THURLOW states it strongly in 2 Williams on Executors, p. 840, where the question is fully discussed and all the authorities are cited.—17 Vesey, 166-71; 7 Ves. 164, 570; 2 Crom. & Jer. 483-4; 11 Beavan, 270; 2 Rand. 297-8-9; 5 Rand. 201.

2. Now, in this case it appears, from the evidence, that Wigginton, administrator of Shepherd, bought a note, well secured by land, two-thirds of the purchase-money having been paid, and secured by three sureties, besides a solvent maker, for two-ninths of its value, for a purpose not consistent with or promotive of the interests of Hutchinson's heirs, but solely to advance the interests of Shepherd's estate, in which they had an interest. The fact that they held the note to be collected for *division among the heirs*, and not for general purposes of administration, known to W. as well as to them, shows that such a sale is irreconcilable with good faith.

3. The whole case proved, as to Owen and McGehee by unwilling witnesses, shows a scheme of fraud and concealment. The parties not only perpetrated a fraud, but intended a fraud. Had Owen been able to pay it in Confederate States notes, or had the administrators been willing to accept payment from him in Confederate States notes, what was the necessity of the roundabout way of effecting it by a sale to W., as administrator of Shepherd, and a settlement by him, with Owen, of S.'s debt? It is affirmed that the adminis-

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trators would not take depreciated notes from Owen; that Owen would not take them from Shepherd's administrator, and thus the administrator did for Wigginton what they refused to Owen. They sold to him for Confederate States notes, when they would not take such notes from Owen in payment.

DAVID CLOPTON, for appellees.

BRICKELL, C. J.—We do not perceive any substantial difference between this case and the case of *Waring v. Lewis*, 53 Ala. 615, *VanHoose v. Bush* (54 Ala. 342); *Baldwin v. Hatchett* (56 Ala. 561); *Stollenwerck v. Nelson* (in manuscript). These cases rest on the principle that an executor or administrator, is clothed with the legal title, and has the absolute power to alien or dispose of choses in action, in his hands for administration. Having this power, no *bona fide* dealing with him can be impeached—in the absence of fraud or collusion, no remedy can be pursued against those who may make payments to him, or to whom he may transfer or with whom he may compound. Whatever may be his improvidence, and whatever liability he may incur in consequence of it, those dealing with him fairly and honestly, are entitled to protection. There is no room on the facts found in this record for the imputation of any impurity of intention to any of the parties. Events have shown that it would have been better for the heirs and distributees of the estate, that the administrators should not have accepted Confederate treasury-notes, in payment of the note given for the purchase-money of the lands. Or, it may be looking alone to the circumstances under which the payment was made, that it can be fairly said it was injudicious. The mere indiscretion of an executor or administrator can not be visited on those who deal fairly with him.—*Field v. Schieflin*, 7 Johns. Ch. 50; Perry on Trusts, § 225; 1 Story Eq. § 579.

Let the decree of the chancellor be affirmed.

STONE, J., not sitting.

[Johnson v. Caffey.]

Johnson et al. v. Caffey.*Action on Sheriff's Bond.*

1. *A bond sued on can be impeached only by a special plea.*—When the complaint avers that the defendants executed a bond under seal, which is the foundation of the suit, they can not impeach its validity, or inquire into its consideration, except by special plea; or raise that question by objecting to the introduction of the bond as evidence.

2. *A sheriff may make more than one official bond.*—Although a sheriff has been already inducted into office, and is acting under an official bond, duly accepted and approved, there is nothing to prevent him from voluntarily executing another official bond; if it be in form and is accepted and duly approved, he and his sureties will be liable upon it for any neglect, or other improper conduct.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

The facts are contained in the opinion.

WATTS & TROY, for appellants.—1. A bond which is taken without authority of law is void.—6 Port. 335; 6 Ala. 128; 14 Ala. 23; 4 Ala. 558; 31 Ala. 76. Bonds taken by civil officers when not authorized or required by law, unless based on sufficient consideration, are void, both as statutory and common law bonds.—1 Brick. Dig. p. 309, § 46.

2. The probate judge has no authority to take and approve any bond of the sheriff, unless it comes within some provision of the various sections of the Code on this subject. If a bond is required under other circumstances, it is not official. It may be good as a common law bond, if it is based on a sufficient and valid consideration.—See authorities *supra*, and 3 Ired. Rep. 557.

3. But the record shows that the bond sued on was illegal and void; required without any authority of law, and was without any valid or sufficient consideration.

HERBERT & MURPHY, for appellee.—1. The only question of importance in this case is, whether the bond, which is the foundation of this suit, was properly admitted in evidence. Under section 170 of the Revised Code, as construed in *Sproul v. Lawrence*, 33 Ala. 674, we contend that any officer who is one of those officers required by law to give an official

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bond "who gives and acts under any bond or bonds is, with his sureties on such bond or bonds, liable as on a statutory bond."—33 Ala. 689.

2. The intention of the law is to protect the public. It is criminal for an officer to fail to comply with section 158 of the Revised Code. Yet the failure of the officer to comply does not, we see, relieve a sheriff or his sureties. So in this case. The judge ought to have had the application, which was made in writing, filed, and he ought to have had the record to show why the new bond was taken. It does not lie in their mouths to say that the bond they gave was not lawfully required, according to form, &c. They can not any more assert this than they could be heard to say that it was not lawfully filed, or approved, or conditioned. It was given and acted on, and is binding.

3. In *Jones v. Schuessler*, it is held that such new bond can not relieve the former bondsmen, unless the requisites of the statute are complied with; but this is a very different question. The new bond might not have the effect to relieve the old bondsmen, but if, as is shown in this case, the new bond is acted on, the persons who gave that bond, and thus put it in the power of the sheriff to continue in office, and receive the public moneys, are estopped to say the probate judge did not comply with the law. This construction harmonizes the spirit and substance of the law with the salutary rule laid down in *Sprowl v. Lawrence*, *supra*.

MANNING, J.—By virtue of the statute in such cases provided, appellee Caffey sued appellant Johnson, late sheriff of Montgomery county, and the other appellants as sureties on his official bond, for injury suffered by plaintiff from the wrongful acts of Johnson, done under color of his office as sheriff, in seizing and selling property of defendant, to satisfy a writ of execution against another and different person. The demurrer filed to the first complaint and afterwards put in again to the amended complaint, was not insisted upon in the argument; and was properly overruled.

The argument here relates to the liability of the sureties upon the bond on which the suit is founded. This bond was made a year or two after Johnson had been elected to—and entered upon—the office of sheriff, and after two other bonds had been successively executed by him and other sureties, for his fidelity in discharging its duties. In form the bond is unimpeachable; and it was taken, approved and filed by the judge of probate, upon whom the duty of performing

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those acts on behalf of the public, is imposed by statute. But the objection to it is—that it was executed after two others had been made and delivered—without an application in writing made and sworn to, by any surety to either of them, and without any complaint made by a grand jury, or members of the Court of County Commissioners, that the bonds previously given were insufficient or defective. Upon these grounds it is insisted that this is, therefore, not a statutory official bond of Johnson,—and that it can not have force as a common law obligation, because (as argued), it is not supported by any consideration.

In reference to this last defence, it is sufficient to say that there is no plea upon which it can rest. It is only by a special plea, that a defendant may “impeach or inquire into the consideration of a sealed instrument.”—Code of 1876, § 2981 (2632.) There is no such plea, nor is there any plea of *non est factum* filed in this cause. The question comes up only upon exceptions to the introduction of the bond sued on as evidence, and to the refusal to exclude it afterwards. And since it was charged in the complaint that the joint liability of the defendants was based upon their having executed the bond, and it was set forth in the complaint as the foundation of the action, and no plea was filed denying that defendants had made it, or otherwise impeaching its validity,—no reason is shown why it should not have gone to the jury. According to the issue joined, the contention in the court below must have been over the charge that the sheriff had under color of his office, committed the wrongful acts complained of. But no questions upon the sufficiency of the evidence to this point, or upon the correctness of the charges of the court to the jury, are presented by this record.

It can not be admitted that the bond would be invalid, because not executed upon a requisition founded on the petition of a surety, or report of a grand jury, or of commissioners, if that question were presented by the pleadings. There is nothing to prevent a sheriff, or other public officer, and other persons as his sureties, from voluntarily executing a new bond,—or to hinder the officer representing the public, from accepting it,—to secure the faithful performance of official duties. The presumption would, perhaps, be that the principal was induced, in such a case, to procure the new bond to be made, to satisfy sureties upon one previously executed. The evidence shows that such was the prompting motive in the present case. There is no error in the record.

Let the judgment be affirmed.

STONE, J., not sitting.

[Bingham v. Montgomery.]

Bingham v. Montgomery.*Petition for Rehearing.*

1. *A petition for a rehearing, not containing the requisite allegations, should be refused.*—A petition for a rehearing, which contains no facts that bring it within the influence of sections 3159 and 3160 of the Code of 1876, should not be granted.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

James Montgomery brought suit on the 16th day of April, 1866, in the Circuit Court of Talladega county, against Arthur Bingham and Richard Hillsman, on a promissory note. At the fall term, 1867, of the said court, a judgment was entered against the defendants in favor of the plaintiff.

Thereupon a motion was made by the defendants for a new trial, on the grounds that "the verdict was contrary to the law and the evidence, and that the verdict was contrary to the charge of the court."

The motion was overruled by the court. Subsequently, by leave of court, an amended petition for a rehearing was filed. To which the plaintiff demurred. The demurrer was sustained by the court, and the petition was dismissed. To this action of the court, the defendant excepted.

GEO W. PARSONS, and TAUL BRADFORD, for appellants. It was the duty of the appellee to perfect the record or supply a copy of his written grounds of demurrer in each instance. This he has not done, although the appellant has given him repeated opportunities to do so, as the orders of the court establish. Therefore he can not complain if the well settled rule, that "no demurrer in pleading can be allowed but to matters of substance, which the party demurring specifies. Rev. Code, § 2556; *Eads v. Murphy*, 52 Ala. 520.

2. A demurrer to a complaint not stating any specific grounds of objection, should be overruled.—35 Ala. 259; 35 Ala. 722; 40 Ala. 63.

JOHN T. HEFLIN, for appellee.—1. The application for *supersedeas* and rehearing is a suit, and an appeal may be taken from the judgment rendered on the demurrer. The

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judgment on the demurrer to the petition for rehearing, is separate and distinct from the judgment rendered at spring term, 1870, in favor of *Montgomery v. Bingham & Hillsman*. 40 Ala. 586; 10 Ala. 279, 282; 16 Ala. 813; 28 Ala. 110.

2. The clerk certifies that the appeal is taken from a judgment in the case of *James Montgomery v. Arthur Bingham and Richard Hillsman*. The record shows this judgment was rendered April 27th, 1876. The clerk certifies the appeal was at the spring term, 1870. More than two years elapsed between the rendition of the judgment and the application for the appeal. It is therefore barred.

3. The application for a rehearing does not contain any ground for relief or defence to the original cause of action. 44 Ala. 48; *Hickson v. Lingold*, 47 Ala. 449. Moreover, the application for rehearing is not within the provisions of the statute for a rehearing at law.—28 Ala. 490.

STONE, J.—The petition for rehearing in this cause, so far as is shown in the record, contains nothing which brings it within the influence of the statutes.—Code of 1876, §§ 3159, 3160; 2 Brick. Dig. 280–1, §§ 56 *et seq.*

Judgment of the Circuit Court affirmed.

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Ejectment.

1. *A power granted by a testator must be executed by all the donees.*—If a testator confers upon several persons jointly a power to do any act, it can not be well exercised if, from any cause, one or more of the donees fail to join in its execution.

2. *A power resting on personal confidence can not be extended beyond its terms.*—A power resting on personal confidence in the donee, can not be extended beyond its express terms and the clear intention of the testator.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

Mildred L. Tarver, Sarah A. Boyd, a married woman, Hickson F. Tarver, and Francis M. Tarver, a minor, by his next friend, Mildred L. Tarver, brought suit in the Circuit Court of Montgomery county against Mary Marks, to recover a lot of land situated in the city of Montgomery. The de-

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defendant for answer to the complaint pleaded the general issue, and suggested "that she and those whose possession she has, for three years next before the commencement of this suit, had adverse possession of the premises, to recover which this suit is brought, and have made permanent improvements thereon."

On the trial, it was proven by the plaintiffs that Benjamin F. Tarver, a resident citizen of Montgomery, "died in November, 1861, seised and possessed of the land" in controversy. He "left eight children surviving him, who are his heirs-at-law, and are still living; and the plaintiffs are four of his children. All of the plaintiffs, except "Mildred L. Tarver, were minors at the time of the death of said Benjamin F. Tarver; and Francis M. Tarver is still a minor." The evidence also showed that the defendant was in the occupation, control and enjoyment of the said lot of land sued for.

The defendant offered in evidence the last will and testament of the said Benjamin F. Tarver, and proved that Britton C. Tarver, and A. B. McWhorter, two of the persons named as executors, duly certified as such, and letters testamentary on the said estate were granted and issued to them on the 18th day of November, 1861, by the Probate Court of Montgomery.

The defendant introduced evidence showing that the said Britton C. Tarver and A. B. McWhorter, as executors of the will of said Benjamin F. Tarver, in consideration of the sum of eight thousand dollars, sold and conveyed the premises in controversy to Loeb Marks on the third day of June, 1863. It was also proven that the said Loeb Marks died in 1869, and the defendant, as his widow, had adverse possession for more than three years before the commencement of the suit; and that she had made valuable, permanent improvements on the premises.

The plaintiffs then proved that Ellen E. McWhorter, who was named as executrix of the said will, never qualified as such until the 11th day of July, 1863.

Among other provisions, the said will contained the following, viz.: "If there should exist a deficiency of cash or money to make the above discretionary allowance of ten thousand dollars to each one requiring the same, then, and in that event, I will and direct that my executors sell either the whole or a part of my real estate as shall be most for the interest of my estate, to meet the demands of the allowance or distribution," &c.

This was all the evidence in the case. The court, "at the
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written request of the plaintiffs, charged the jury that if they believed the evidence, the plaintiffs were entitled to recover." To this charge the defendant excepted.

DAVID CLOPTON, for appellant.

RICE, JONES & WILEY, for appellee.

BRICKELL, C. J.—The only fact which can be supposed to distinguish this case from that of *Tarver v. Haines*, 55 Ala. 503, is, that the sale and conveyance of the lands, was made by the two executors of the will of Benjamin F. Tarver, who had qualified—the executrix qualifying subsequently. In the case referred to, we decided that the statute, Revised Code, § 1609, forming section 2218 of the Code of 1876, had no application to, and did not affect a discretionary power of sale, conferred on executors as a matter of personal trust and confidence. That by the will of Benjamin F. Tarver, there was no devise of the lands to his executors to sell, nor was there a naked power of sale conferred on them. The power conferred was discretionary, resting in the trust and confidence the testator reposed in the executors and executrix collectively; and was incapable of being exercised by the executor continuing to act, after the resignation of his co-executor and the executrix. The whole theory of the decision, and the reasoning on which it depends, is, that a power resting on personal confidence in the donee, can not be extended beyond its express words, and the clear intention of the testator. If the trust and confidence is reposed in several, and the power conferred on them jointly, without doing violence to the terms of its creation, and the intention of the testator, it can be exercised only by all the donees. The power is not well exercised, if from any cause, one or more of the donees does not join in its execution. It is not material from what cause the failure to join originates. The neglect or refusal of the executrix to qualify, rendered the power as incapable of exercise, as did her subsequent resignation in the case to which we have referred.

Affirmed.

[Hyrschfelder v. Keyser.]

Hyrschfelder v. Keyser.

The Power of a Partner over Partnership Property.

1. *A partner can sell all the stock in trade in a single transaction.*—A member of a partnership has control of its property, and can sell the whole stock in trade by a single contract.

2. *A partner can not transfer partnership property in payment of his individual debts.*—One partner can transfer the property of the firm to its creditor in discharge of its indebtedness; but he has no authority to dispose of it in payment of his individual liabilities, when it is needed for the satisfaction of partnership debts.

3. *All errors will not cause a reversal.*—For an error without injury, a judgment will not be reversed.

APPEAL from the Circuit Court of Escambia.

Tried before the Hon. P. O. HARPER.

The facts are contained in the opinion.

HERRERT & BUELL, for appellant.—1. The court erred in permitting, against the objection of the plaintiff, this question to be asked: "How much did Keyser owe you in those transactions, before the partnership was created?" and permitted the witness, Still, to answer, "from eight hundred to one thousand dollars." This was clearly irrelevant,—1 Brick. Dig. p. 780 § 100—and must reverse the judgment.

2. The charge was erroneous. It makes the case turn on whether Judge intended to convey title, when under the facts, he had no power to convey. It appears the conveyance was made to defeat the will of the other partner. This could not be done. It would be utterly void as to the firm. Story on Part. § 128, and authorities cited.

3. Moreover, the charge was an error, because no price was fixed for the timber; and no evidence of what timber was sold at, was admitted. Neither the bill of sale, nor oral evidence showed it was all the timber in Mendenhall creek. The contract was not complete.—22 Ala. 675; 22 ib. 796.

S. J. CUMMING, for appellee.—1. In cases of the trial of the right of property, much latitude is necessarily allowed in the admission of evidence. But if the court erred in the admission of Still's testimony, it was error without injury as shown by the record.—51 Ala. 398.

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2. The charge given by the court is a correct statement of the law and a proper construction of the bill of sale. The court can not take notice of a charge not contained in the record.

MANNING, J.—The contest between these parties is a trial of the right of property founded on a claim by appellee, Keyser, to a lot of sawed sticks of timber which had been seized by virtue of a writ of attachment sued out in February, 1871, by appellant as plaintiff, against one Still. Still was, it seems, personally instrumental in having the attachment issued against himself, and levied on the timber. The timber belonged to a partnership of which he was a member, of the firm-name of Still & Judge, who owned the saw-mill at which the sticks had been sawed: and the business of the firm from its beginning in December, 1868, had been kept up and its operations sustained, by advances from time to time made by Keyser under an agreement entered into with him, by which the timber, when sawed should be sent to him in Florida, to be sold for the repayment of himself and on account of Still & Judge.

There being a cessation in 1870, of the operations of the mill,—and some thirteen hundred sticks of timber (more or less) being afloat in the creek on which the mill was situated, in Escambia county, Alabama,—Judge, learning that his partner, Still, and appellant were taking steps to have a large portion of them seized under a writ of attachment to pay a debt his partner owed to appellant, went to Keyser, to whom the firm was indebted to an amount between \$2,000 and \$3,000, and executed to him in the firm name, a bill of sale of the timber;—and the same was soon thereafter branded with the mark by which Keyser's ownership was indicated. Judge did not inform Still or the appellant, Hyrschfelder, what he had done; though when he found them engaged in suing out an attachment at the house of a justice of the peace, to be levied on the timber, he told them he should go and inform Keyser in order that he might protect his interest in it. The attachment they were getting out when this declaration was made to them, was not levied; but another was afterwards issued by the clerk of the Circuit Court of Escambia county, and levied on 559 sticks of the timber, though not until some time after the bill of sale was made and all the timber had been marked as Keyser's. The sticks thus levied on were claimed and obtained by him, and are the subject of this contention. The bill of sale was as follows:

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“MILTON, FLA., January 6th, 1871.—For and in consideration of past advances and the further advance of one hundred dollars this day paid us, we hereby sell and deliver to William J. Keyser, thirteen hundred sticks of sawn timber (more or less), now in Mendenhall creek, below our steam-mill in Escambia county, Alabama.

“[Internal Revenue Stamp.]

“(Signed)

STILL & JUDGE.”

The timber that came to the hands of Keyser in Florida, did not, when sold by him reimburse him by about \$280; but some of the sticks did not reach him there, else,—he would have been overpaid by a small sum.

On the cross-examination of Still, who was a witness for plaintiff, Hirschfelder, he was asked, in reference to dealings he had with Keyser before he became a partner with Judge: “How much did Keyser owe you in those transactions before the partnership was created?” to which he “answered from \$800 to \$1,000.” The question and answer were each allowed against the objection and exception of appellant, Hirschfelder. And it is here insisted that they should have been suppressed by the circuit judge for irrelevancy. It may be true that the question and answer were not relevant to the matter in issue; but we think it manifest that they could not have influenced the verdict of the jury injuriously to appellant, but rather the contrary; since the fact proved might seem to the jury to justify the endeavors of Still to prevent Keyser from receiving all the timber. And for error without injury, a judgment will not be reversed.

The only other error assigned is,—that “the court among other things charged the jury that the instrument read in evidence was on its face a legal and proper bill of sale, and if Keyser and Judge intended it to be and treated it as such, and it was founded on a sufficient consideration, it was valid and passed the title to the timber out of Still & Judge to Keyser, whether the price was agreed on or not, and that if no price was agreed on the law would infer that the market price was to be paid;”—which charge plaintiff excepted to.

In Perkins' Ed. of Collyer on Partnership, (§ 394) it is said: “In a very early case ‘it was agreed by the court that the sale of one partner is the sale of them both;’ and in more recent times the power of one partner to bind the firm by simple contract has been continually recognized in cases of sale of the partnership effects. It is within the general scope of partnership authority for one partner to sell and dispose of all the partnership goods in the orderly and regular course

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of business. He may sell the whole stock in trade at once by a single contract." Moreover, each partner has a specific lien on the partnership stock, for moneys abstracted by his co-partner beyond the amount of his share.—Id. § 125. And of course, no partner can, without injustice to his co-partner, cause the partnership goods to be appropriated to his individual debts, when they are needed and ought to be applied to the payment of the partnership debts. These are entitled to priority of payment from that source, over the debts of the partners, as individuals.

Now, the timber which is the subject of this controversy had been manufactured for sale. It was intended to be floated to market to be sold; to be all disposed of together. And engagements had been made with Keyser, a creditor of the firm, which imposed it as a duty on each of its members to see to it that the timber should go to him. Judge did not, therefore, act in derogation of the rights of his partner. Still, in making a bill of sale which while it might interfere with the direction the latter desired the timber should take, yet disposed of it so as to discharge his, as well as Judge's debt, and that a debt which was entitled to precedence. Judge having as partner the power to sell the timber to Keyser,—we think there was no error in the instruction given to the jury, to aid them in their view of the evidence upon which the verdict was to be founded.

Let the judgment of the Circuit Court be affirmed.

Grady *et al.* v. Hall.

Suit on an Attachment Bond.

1. *A person advancing money to make a crop, can enforce his lien by attachment.*—When provisions, stock or money have been advanced to make a crop, and the person obtaining them acknowledges the advances in a note or written obligation, declaring therein the purposes for which such advances were made, and the instrument is properly recorded within sixty days, it is a lien on the crop and on the stock furnished or bought with the money advanced; and the party advancing the money, or supplies, has a remedy co-extensive with that given the landlord and can enforce the lien by attachment.

2. *Such a lien is not lost, by the character of the instrument that evidences the debt.*—Such a lien is not impaired or destroyed by the fact that the same instrument contains a mortgage on the same property to secure the same debt.

[Grady v. Hall.]

APPEAL from the Circuit court of Etowah.

Tried before the Hon. W. L. WHITLOCK.

This suit was begun by James Hall, at the fall term, 1876, of the Circuit Court of Etowah county, to recover damages for the breach of an attachment bond made by Mary Grady, Elizabeth Grady, J. C. Abney and A. J. Blair. The defendants then pleaded, "in short, by consent, *first, non-assumpsit; second, covenants performed; third, that the said attachment was not sued out wrongfully, or vexatiously, or maliciously, or without probable cause.*"

On the trial, the defendants offered in evidence the following instrument:

"The State of Alabama, Etowah county. Know all men by these presents, that having this day received from Mary A. Grady eighty-five dollars advanced in money, or its equivalent in a good young mare, and having given my note bearing even date with this instrument, and due on the 25th of December, 1875, for said sum of money, I, James Hall, do hereby declare that such advance was obtained by me *bona fide*, for the purpose of making a crop the ensuing year, on William Grady's plantation, in Etowah county, and that without the same it would not be in my power to procure the necessary team, provisions and farming implements to make a crop; and in consideration of said advance and to secure the same, I hereby grant, bargain, sell and convey to the said M. A. Grady the entire crop of cotton and corn, and everything else which may be produced by me on the said W. Grady's plantation the ensuing year, and also the following property, viz.: the said mare above mentioned. But this conveyance is on the following condition: If I fail to pay the said note on or before the said 25th day of December, 1875, when the same falls due, then the said Mary A. Grady is authorized to take possession of said property above conveyed, or any of it, and is also authorized, after giving thirty days notice of the time and place of sale in some newspaper published in or nearest to said county, to sell the same to the highest bidder, for cash, at the residence of the said J. Hall, and to execute title to the purchaser, and of the proceeds to pay, first, the expense of seizing, advertising, selling and conveying; and secondly, the amount with interest that may be due and unpaid on said notes; and lastly, shall return any surplus of the proceeds to the undersigned." This instrument, dated December 28th, 1874, was duly executed, acknowledged and deposited with the judge of probate for

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record within sixty days after its execution and was properly recorded.

The defendants introduced evidence showing that the plaintiff had sold all the "corn crop" produced on the said plantation, and that the purchaser was gathering the corn, and had hauled off a part of it without the consent of Mary A. Grady; that he had traded off the mare before the issue of the attachment, "for the wrongful and malicious suing out of which the suit was brought;" and that the said note was unpaid at that time.

The court, *mero motu*, charged the jury "that the instrument read in evidence before them, executed by the plaintiff to the defendant on the 24th of December, 1874, was not an advance lien, or such an instrument as would authorize the suing out of an attachment on." And the defendants excepted to this charge. They then requested the court to give the following charges, which were in writing, to the jury: "That if they believe, from the evidence, that the plaintiff made and executed to the defendant, Grady, the written instrument read in evidence to them; and further, that the plaintiff was about removing the corn crop grown on premises during the year 1875, by him, therefrom without the consent of said Grady, and without paying said note described in said instrument, then she had a right to sue out an attachment on said instrument;" which charge the court refused, and the defendants excepted.

The defendants also requested the following charges, which were in writing: "That if the jury believe, from the evidence, that the plaintiff had removed the crop, or any portion thereof, grown by him in 1875, on the premises described in said instrument, then she had a right to sue out an attachment. If the jury believe, from the evidence, the plaintiff had traded the mare mentioned in said written instrument, and without paying said note, there was good ground for an attachment." These charges the court refused to give, and to the refusal of each the defendants separately and severally excepted.

JAMES AIKEN, and J. H. DISQUE, for appellants.—The instrument on which the attachment was issued created a "crop lien," and complies with the requirements of the statute.—Revised Code, § 1858 *et seq.* The attachment was issued before the law day, and while the crop was in the field ungathered.—48 Ala. 358; 51 Ala. 434; *Watson v. Auerbach*, 57 Ala. 353.

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J. L. CUNNINGHAM, and M. J. TURNLEY, for appellees.

1. The mortgage deed does not create a crop lien; it is not a note or other written obligation given for advances in the terms of the statute.—Code, § 1858 *et seq.* It was, in fact, a mortgage given to secure the payment of the debt.

2. The note is not set out in the deed, and the court can not infer that it complied with the statute so as to give it a statutory advance lien.—50 Ala. 49. The authorities relied on by the appellants do not sustain them. The mortgage deed in this case can not be construed to be a note or obligation given to secure advances, although it may contain all the elements of a statutory lien.—51 Ala. 434. The note or obligation for the payment of advances claimed, is shown in this case.—Authorities, *supra*.

3. The appellee insists that the acceptance of the deed was a waiver of a lien for advances, even if any would otherwise have existed. The deed is clearly a mortgage.

STONE, J.—The instrument brought to view in the bill of exceptions, given by appellees to appellant, and bearing date December 28, 1874, conforms to the requirements of section 3286 of the Code of 1876; and being recorded in the county within sixty days after its execution, is a “lien on the crop, and on stock bought with the money, or advanced.” And the person thus advancing is armed with the right to sue out attachment to enforce this lien, co-extensive with the right of landlords to sue out such process for the collection of rent.—Code of 1876, §§ 3288, 3472; *Watson v. Auerbach*, 57 Ala. 353.

This lien, being conferred by the statute and the contract, is not destroyed or impaired by the fact that the same instrument contains a mortgage on the same property, to secure the same debt. Each of the securities can stand, and they are not incompatible; but a resort to one would render it improper to resort to the other at the same time, for the purpose of subjecting the same property to the payment of the debt.—See *Gafford v. Stearns*, 51 Ala. 434; *McKinney v. Benagh*, 48 Ala. 358.

The rulings of the Circuit Court are in conflict with these views, and it follows that the judgment must be reversed and the cause remanded.

[Levystein & Simon v. Whitman.]

Levystein & Simon v. Whitman *et al.*

Application of Payments.

1. *A debtor may direct the application of a payment.*—A debtor before, or at the time, of payment, may direct its application; if he does not, the creditor may apply it as he pleases. If the money paid is derived from a particular source or fund, its payment must be applied to the relief of such fund, unless an agreement be made for its application otherwise.

2. *If a payment be disputed, the party affirming it must prove it.*—If a payment be disputed, the burden of proving it lies on the party affirming it; and when the debtor asserts that he directed the appropriation of a partial payment, the burden of showing it rests on him.

3. *A creditor can not divert a payment without the consent of the debtor.* It is the application of the payment by the debtor which deprives the creditor of this right, and also hinders the law from appropriating it; but if the creditor proposes to divert the payment from the relief of the fund or source whence the money is derived, he must obtain authority from the debtor for such diversion.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. HURIOSCO AUSTILL.

The facts are contained in the opinion.

STONE & CLOPTON, for appellants.

ELMORE & GUNTER, for appellees.

BRICKELL, C. J.—The bill is filed to foreclose a mortgage, and the single point of controversy is whether the mortgage debt had been paid prior to the commencement of suit. The mortgagor was at the time of the several payments, owing the appellants a debt by account unsecured, and one of the payments was derived as is claimed, from a sale of cotton covered by the mortgage, while the other was derived from a sale of cotton, the mortgage did not embrace. The whole controversy is dependent on the evidence, rather than on any question of law. The rules of law governing the application of partial payments, when the party making the payment is indebted to the party receiving it, on more than one account, are well settled by former adjudications of this court, which merely follow the general current of decision. So far as they apply to the present case, they may be thus stated; the debtor before, or at the time of payment, may

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direct its application—if he does not direct its application, the creditor has the right to apply it as he pleases—but if the payment is derived from a particular source or fund, it must be applied in relief of the source or fund from which it arises, in the absence of an agreement to the contrary.—*Beebe v. Stickney*, 36 Ala. 482; *Robinson v. Allen*, ib. 524; *McDonnell v. Br. Bank Montgomery*, 20 Ala. 313; *Callahan v. Bozeman*, 21 Ala. 336; *Webster v. Singley*, 53 Ala. 208. If a payment is disputed, the burthen of proving it, lies on the party affirming it. And when the debtor claims to have directed the appropriation of a partial payment, the payment not being the matter of dispute, the burthen of proving the direction rests on him. It is the direction which takes away the right of the creditor to apply it, and relieves it from the application the law would make of it, in the absence of an application by either.—2 Jones on Mortgages, § 906; *Knox v. Johnston*, 26 Wis. 41. So, if the creditor proposes to divert a payment from the relief of the source or fund, from which it arises, he must show for the diversion, the authority of the party to be affected.

Keeping in view these principles we have examined the evidence to ascertain *first*, whether the mortgagor, at or before the delivery of the cotton not embraced by the mortgage, directed the application of the proceeds of its sale, to the payment of the mortgage debt. The fact of such direction, as we have said, is to be proved by the mortgagor. This cotton seems to have been the property of Lamkin and the mortgagor as tenants in common of a crop, and was to share on the division of the crop, to which the mortgagor was entitled. Lamkin states that he was present at an interview between the mortgagor, and one of the appellants, in which it was agreed this cotton should by him be delivered to the appellants, and the proceeds of its sale applied to the payment of the mortgage debt. The time of this interview, he fixes as the election day in the fall of 1871, and its place as Lowndesboro. The written request of the mortgagor to the appellants to take up the mortgage, is dated at Lowndesboro, and on the seventh day of November, 1871, which is matter of law, was the election day of that year. The law day of the mortgage had then passed, and it is but fair to presume, there was in this interview, some statement made of the reasons and motives, influencing the mortgagor to request and the appellants to agree to *take up* the mortgage. If these reasons and motives were stated, they would probably shed light on the fact whether such an agreement was made, and

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would confirm or weaken the force of the testimony of the witness. That there was other conversation between the parties, the witness states, but he recollects no more than this agreement, and it is evident he is stating the effect or the impression made on him by what was said, rather than what was actually said. All evidence of verbal admissions or declarations, must be received with *great caution*.—1 Green. Ev. § 200. And one of the soundest reasons for the rule is that it is almost impossible for the witness proving them, to avoid stating rather *what he understood the parties to mean, than what they said*, so that the triers of the fact, may for themselves determine the true import and meaning of the admission or declaration.

Passing over the infirmity of this evidence, it is not consistent with the testimony of the mortgagor, who proves no agreement made with the appellants at the time they were requested to *take up* the mortgage, but instructions given by him at the time of the delivery of the cotton, to apply it to the payment of the mortgage debt. The delivery of the cotton was made by Lamkin, more than one month after the mortgage was taken up, and he states that at the time of the delivery, no instructions were given as to its application. The appellants in their testimony deny that there were any instructions given at any time as to the application of the cotton, and state that it was not applied to the mortgage debt, but to an unsecured debt owing them by the mortgagor. At the time the appellants agreed to *take up* the mortgage, the mortgagor was indebted to them for advances and merchandise in a sum exceeding four hundred dollars. The day of and the day after the delivery of the cotton, this indebtedness is increased without any other payment, (than the one hereafter referred to as claimed to have been derived from cotton embraced in the mortgage) by an advance of money, (more than three hundred and fifty dollars), and merchandise, amounting to more than seven hundred dollars, in the aggregate. If the appellants agreed, or if instructions were given them to apply the cotton to the mortgage debt, the singular course of dealing was that they were lessening a debt secured, and increasing an unsecured debt. For it is not insisted that it was intended the mortgage debt should be extinguished by the *taking of it up*, as it is termed by the parties. The mortgage was to remain a security for the debt, and all that was intended, was a mere change of creditors. We conclude it is not shown by a preponderance of the evidence, that it was agreed before, or that instruc-

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tions were given at the time of the delivery of the cotton to apply it to the mortgage debt, and consequently the appellants had the right to apply it to the unsecured debt.

The other payment, we think is shown to have been derived from the cotton crop covered by the mortgage. It is the fair inference from the evidence, that this fact was known to the appellants when they received and sold it, and on them rests the burden of showing that there was an agreement either express or implied with the mortgagor, by which it would be applied otherwise than to the mortgage debt. When the arrangement was made to take up the mortgage, or rather for its assignment to the appellants, the mortgagor said, he expected to obtain the money to pay the mortgage debt from other sources than the cotton; and that the cotton should be applied to the payment of the debt he owed for advances. This is not controverted by the mortgagor in his evidence, and it seems to us corroborated by the course of dealing between the parties. If there was no agreement between the mortgagor and the appellants in reference to this cotton, the mortgage gave them the immediate right to its possession and power to sell and apply it to the payment of the mortgage debt. Yet, it seems from the mortgagor's evidence, that on the 20th of December, 1871, *he left the receipts for the cotton*, with the appellants, to hold until it would bring twenty cents per pound. The receipts were most probably from a warehouseman, or other person, with whom he had stored it, and he gives directions as to its sale, inconsistent with the rights of the appellants under the mortgage, which had been assigned them. On the next day after the sale of the cotton, he obtains in money from the appellants six hundred and fifteen dollars, and merchandise amounting to several hundred dollars in addition, the cotton having sold for seven hundred and sixty-six 15-100 dollars. In view of all the facts we feel satisfied that there was an agreement as stated by the appellant, Simon, that the cotton should be applied to the unsecured debts and that the mortgagor was expected from other sources to pay the mortgage debt. A payment of the mortgage debt not being shown, a decree for foreclosure should have been rendered. The decree of the chancellor is reversed, and a decree will be here rendered granting the relief prayed for by the bill.

[Hall v. Burkham, Hall et al.]

Hall v. Burkham, Hall et al.*The Construction of Written Instruments.*

1. *An instrument reserving the power of revocation is a deed.*—An instrument which conveyed all the property owned by the grantor to a trustee for the benefit of her grand-children after her death,—but retained for her the possession and use of it during her life, and reserved to her the power of revocation of the grant, must be considered as a deed, and not as a will.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

William Hall; Dorion Hall, Arthur B. Hall, and Elizabeth Anderson Hall, minors, filed a bill of complaint by their next friend, John Bragg, in the Chancery Court of Montgomery county, against William B. Hall, Charles B. Burkham, Matthew W. Collins, Lehman, Durr & Co., and Josiah Morris & Co., to subject the real estate described therein to the trust created by an instrument executed by Dorion Hall. It is in these words, viz:

“The State of Alabama, Lowndes county. Know all men by these presents, that I, Dorion Hall, of said State and county (being at this time free from all debts and liabilities), for and in consideration of the sum of five dollars to me in hand paid by my son, William B. Hall, of said State and county, at and before the ensealing of these presents, the receipt whereof is hereby acknowledged, and in further consideration of the natural love I have and bear to certain of my grand-children, to-wit: William Hall, Elizabeth Anderson Hall and Dorion Hall, all infants of tender age and children of my said son, William B. Hall, above named, I have given, granted and conveyed, and by these presents do give, grant, convey and assign to the said William B. Hall all of my property, of every name and nature, real, personal and mixed, and all my choses in action of every kind. I especially mean all my plantation and tract of land on which I now reside, located in said county, near Midway, between Lowndesboro and Hayneville, with all my stock, horses, mules, cattle, hogs and sheep, all my plantation tools and implements, wagons, carriages, harness, &c., all my household and kitchen furniture, &c. To have and to hold to him, the said William B. Hall, his heirs and assigns, in trust, however, and for the express trust and condition hereinafter

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mentioned, viz: I, however, hereby reserve the possession and use of all said property above mentioned, together with the rents and profits thereof for my support, maintenance and enjoyment during the term of my natural life. After my decease, the said William B. Hall shall retain and take possession of, in his own right, and as his own property, all my household and kitchen furniture, but shall hold all the other property mentioned above, and keep it together for the use and benefit of my said grand-children above named, and for the use and benefit of such child or children of my said son, William B. Hall, as may hereafter be born, said trust to continue during the minority of the youngest child, who shall take under this deed as above set forth; and said trustee shall place at interest, upon good security, the net annual income of said property, after paying all necessary expenses incurred in keeping up said plantation. Whenever either of said grand-children, for whose use and benefit the said trust is held, shall arrive at twenty-one years of age, or shall marry, the said trustee shall pay to them, or either of them, their equal share of the rents and profits that shall have then accrued.

"Whenever the youngest of said children of my said son William B. Hall, shall arrive at twenty-one years of age (who shall take under this deed), then the said trustee shall sell off said property, to the best advantage, and divide and distribute all the net proceeds thereof, also the rents, and profits and interest that may have accrued, equally between said children of my son, William B. Hall, as above specified, and share and share alike.

"I hereby reserve the absolute right and power, for my own benefit, should I at any time think proper so to do, to revoke this deed. I also reserve the absolute right and power, in case my said son, William B. Hall, shall decline to accept said trust, or should resign the same after accepting, or should die before me, to nominate and appoint another trustee in his stead.

"In testimony whereof, I have signed, sealed and delivered these presents on this, the eighteenth day of March, A. D. 1871.

"DORION HALL. [SEAL.]

"In the presence of

"THOMAS M. WILLIAMS, } [Fifty cents U. S. Rev. stamp.]
"S. M. REESE.

"I accept the foregoing trust, this, 18th day of March, 1871.

WILLIAM B. HALL.

"Witness: T. M. WILLIAMS."

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On the hearing of this cause, the court was of the opinion that the foregoing instrument "is testamentary in its character, and not having been probated, the court is of the opinion that complainants are not entitled to relief in this action." And the bill was dismissed without prejudice.

On an appeal to the Supreme Court, the following agreement was made by counsel, viz:

"Agreed in this cause, pending in the Supreme Court, that the court may decide the single question, whether the instrument on which complainants rely for a recovery and which is the foundation of their claim, signed by Mrs. Dorion Hall, grandmother of complainants, is a deed or a will. All other questions are waived, and decision of the cause to turn on this single point.

"Montgomery, May 27th, 1878.

"W. L. BRAGG,

"Sol. for appellants in above case.

"DAVID CLOPTON,

"Sol. for creditors of William B. Hall.

"D. S. TROY,

"Sol. for Hall, trustee."

The counsel of the parties to the suit, also entered into the following agreement, viz.:

"It having been agreed, that the sole and only question for the decision of the court shall be, whether the instrument in writing executed by Mrs. Dorion Hall, and which the Chancery Court declared to be testamentary in its character, is a deed or a will:

Now, in either event, whether the Supreme Court shall decide said instrument is a deed or will, then it is further agreed that a consent-decree shall be entered in said court, whereby it shall be declared that the life-interest of the said William B. Hall in the following described lands are subjected to the claims of Lehman, Durr & Co., Josiah Morris & Co., Matthew W. Collins, and Owen Ragan, to-wit: The north half of section two, in township fifteen; and the west half of the north-west quarter of section one, in township fifteen; all of section thirty-six, in township sixteen, except the east half of the north-east quarter; all of section thirty-five, in township sixteen; and the east half of the north-west quarter of section thirty-four, township sixteen. And also the absolute fee simple estate of said William B. Hall in and to the west half of the north-east quarter of section thirty-six, in township sixteen. All the above named lands are in range thirteen, and are situate in Lowndes county in the

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State of Alabama, and together make what is known and called "The Swamp Place," described in the record on file in said cause.

If the Supreme Court shall be of opinion that said instrument is a deed, and shall so decide, then so much of the chancellor's decree as declares said instrument to be testamentary in its character, shall be reversed, and a decree rendered therein declaring that said instrument is a deed; but this shall not have the effect to prejudice any rights of the said Lehman, Durr & Co., Josiah Morris & Co., Matthew W. Collins, and Owen Ragan, as above declared and set forth; for in any event their rights in the premises shall be saved by the said consent-decree.

DAVID CLOPTON,

Sol. for appellees, except Wm. B. Hall.

BRAGG & THORINGTON,

Sols. for appellants in the above cause.

D. S. TROY,

Sol. for William B. Hall, trustee."

BRAGG & THORINGTON, for appellants.—1. The error of the court consisted in the construction of a written instrument. A will is defined to be the legal declaration of a man's intentions of what he wills to be performed after his death. 2 Bouvier's Law Dic. title *Will*. A will is ambulatory. It passes no present interest. No title passes by it till the death of the maker has made it a completed instrument. But a deed is different. By a deed an immediate title vests in the taker. The deed may be so shaped that a power of revocation is reserved by which the title conveyed may be divested at any time during the life of the grantor, or upon any named contingency. Such provisions as this have been common in deeds of family settlement from the early history of the law. 1 Jarman on Wills, pp. 16-20,—where this view of the law is fully sustained.

2. The deed of trust from Mrs. Dorion Hall to W. B. Hall, as trustee, is not a will, nor is it testamentary in its character.—1 Jarman on Wills, pp. 16-20; 3 Mylne & Keen. 32; 13 Ala. 731-742; 3 Porter, 69; 28 Ala. 309; 24 Ala. 122; 42 Ala. 365; *ib.* 589; 52 Ala. 446; 6 Ala. 631.

3. Nothing is more common in deeds of family settlement like the present, than the insertion of a power of revocation in the grantor. Sometimes it is a general power of revocation, and sometimes it is expressed in qualified terms; but in either event it is valid as a deed and has been so from the

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time of Coke and Plowden.—3 Coke's Reps. 25; 2 Bouv. Dic. Tit. Revocation, and authorities there cited; 1 Sugd. on Powers, p. 216 (m. 158); 4 Kent Com. (3 ed.) p. 336-7; Rev. Code, § 1608.

4. The estate conveyed by this deed vested as perfectly the moment the deed was executed by Mrs. Dorion Hall, and became as complete as it did at her death. The only difference was, that at her death the trustee could go into the possession and use of the property conveyed, and she could no longer exercise the power of revoking the deed, but these events had nothing to do with the vesting of the estate as conveyed by the deed.—2 Washb. Real Prop. 601-2, note, and authorities cited. It was a gift *inter vivos*. The test is whether the instrument is to take effect and vest rights only at the death of the grantor.—42 Ala. 367, 591.

5. In construing instruments of this character, the courts are largely influenced by the intention of the parties.—24 Ala. 128. All the parties to this instrument construed it to be a deed and acted on it as a deed. On the second day of April, 1873, the trustee filed this deed for record in the office of the judge of probate of Lowndes county, Alabama, where it was duly recorded on the ninth day of June, 1873.

6. The delivery of the deed of trust is sufficiently shown by the proof.—29 Ala. 147; 26 Ala. 136; 11 Ala. 413; 15 Ala. 271. Another important consequence follows from this. The execution and delivery of the deed to the trustee by Mrs. Dorion Hall at the time the deed was made, was a strong circumstance showing "the design to divest the power of revocation."—2 Molloy Reps. 257. But if there was no proof of delivery this would not affect the character of the instrument, or its validity.—1 Johns. Ch. Rep. 329; 1 ib. 256; 2 Sandf. Ch. Reps. 400.

7. The law is, that if one acquire property from a trustee, knowing that the trustee is thereby making an unlawful conversion of it, and with knowledge, actual or constructive, of the trust, he becomes a trustee of the property for the *cestui que trust*.—1 Story Eq. Jur. § 512; 5 Smedes & Marsh. 499; 31 Ala. 39; 1 Brock. 330.

DAVID CLOPTON, for appellees, except William B. Hall.

D. S. TROY, for William B. Hall.

MANNING, J.—The chancellor erred in holding that the instrument on which this suit was founded, executed by Mrs.

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Dorion Hall, is of a testamentary character, and not a deed. Upon its face it purports to be a deed. Its introductory words are those almost always employed in a deed. Then, as it embraces all the property of Mrs. Hall which might be a cause for objection on the part of creditors,—instead of declaring herself according to the common clause in a will,—“of sound and disposing mind and memory”—she, appropriately to the situation, describes herself as “being at this time free from all debts and liabilities.” Next follows the recital of a money consideration of five dollars from the trustee, and of love and affection to the beneficiaries, her grand children. Thereupon she gives, grants, conveys and assigns, all her property of any kind, to her son, the trustee, for the benefit of his children,—reserving to herself the possession and use—not title—thereof for her support, maintenance and enjoyment during her natural life; at the expiration of which, her son is to take possession of some furniture and other things as his own, but of the residue and bulk of the property, for the benefit and in trust for her grand children. In conclusion, the instrument proceeds as follows: “I hereby reserve the absolute right and power for my own benefit, should I at any time think proper so to do, to revoke this deed. I also reserve the absolute right and power, in case my said son William B. Hall, shall decline to accept this trust, or should resign the same after accepting, or should die before me, to nominate and appoint another trustee in his stead. In testimony whereof, I have signed sealed *and delivered* these presents, on this the 18th day of March, A. D. 1871.” The instrument is signed by Mrs. Hall as maker, and attested by two subscribing witnesses. It is skilfully written; and upon it, is indorsed an acceptance of the trust, bearing the same date, signed by William B. Hall, and attested in writing by one of the subscribing witnesses to the bond.

Mrs. Hall never exercised the power of revocation she reserved. Neither of the events happened upon which she could exercise the power of appointing another trustee. She never complained of the instrument, as in any respect, not expressing her intention; and she is dead without leaving any creditors to complain of its operation.

There is no rule of law which prevents an instrument like this, if intended to be a deed, from having effect as a deed. The intention in this regard of the maker, must be ascertained from the writing itself viewed in the light which the circumstances attending the transaction may shed. In this

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case there are none which compel or enable us to see in the language used any other meaning than that which the words employed usually and naturally express.

The argument that it is a will is founded chiefly upon the provisions by which Mrs. Hall reserved the possession and use of the property during her life, and a power to revoke the instrument. According to numerous decisions of this and other courts, the former of these provisions does not by itself produce the effect contended for. And in regard to the power of revocation, the better opinion is that it tends rather to rebut than to sustain the idea that the instrument containing it is of a testamentary character. "The insertion of such a clause, so far from indicating an intention to make a will, imparts quite a contrary color to the transaction, as a will wants not an express power to make it revocable."—(1 Jarman on Wills, 17). And even more decidedly is the intention implied, of making an instrument operative to transfer the title from its date, to-wit, a deed,—by the declaration in it, that in case the person to whom as trustee it is made, shall decline to accept the trust, or after accepting resign it, or die, *in the lifetime* of Mrs. Hall, she shall have the power to appoint another trustee in his stead.

We are clearly of the opinion that the instrument in question was properly put into execution as a deed, and need not be offered for probate to be established as a will.

The parties having agreed, in the event that this should be our opinion, upon the terms of a decree by consent which should be entered in this cause, let the decree so agreed on be enrolled on the minutes of the court, and executed.

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Action on an Account.

1. *The action of the court on a demurrer to useless pleas will not be considered.*—Where a case according to the proof properly turned on a plea of *non-assumpsit*; and special pleas were unnecessary, and no result could have been brought about by their interposition, the court will not consider the rulings on demurrer.

2. *If the facts show the plaintiff has no right, error will not cause a reversal.*—If all the facts in a case show that the plaintiff is not entitled to recover, the appellate tribunal will not reverse the judgment of the Circuit Court, if it should err in its rulings on demurrer, or in receiving evidence.

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APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

At the fall term, 1876, of the Circuit Court of Talladega county, the plaintiff, Andrew J. Street, sued Samuel C. Kelley, E. B. Nelson and Henry Clarady, partners under the name and style of S. C. Kelley & Co., for the value of goods, wares and merchandise, sold by him to the defendants. They pleaded *non-assumpsit*, and seven special pleas. To the special pleas, the plaintiff demurred. But the demurrer was overruled by the court. The plaintiff then filed a replication to the pleas. To this replication the defendant demurred, and the court sustained the demurrer; and thereupon the plaintiff took issue on the pleas interposed by the defendant.

On the trial, the plaintiff introduced as evidence the following contract, viz:

"This article of agreement made and entered into at Munford, Alabama, this 13th day of March, A. D. 1875, by and between A. J. Street and E. B. Nelson, of the firm of S. C. Kelley & Co., witnesseth, that the said Street agrees and binds himself to do the following things and matters, to-wit: to furnish Robbs & Bros. supplies of every kind and money to run the coaling contract that said Robbs & Bros. have with S. C. Kelley, and enough of everything to enable said Robbs & Bros. to make and deliver the coal as fast as the said S. C. Kelley & Co. have agreed to deliver it at the Alabama Furnace; and further, the said Street agrees to furnish them so that the stock of wood shall be no less on hand chopped than it now is, nor the amount of coal on the hearth no less than it now is at this time, until the said job between the said S. C. Kelley & Co. and the Alabama Iron Co. is finished and completed. It is further agreed and understood by all parties interested in this instrument, that the said Robbs & Bros. are getting from S. C. Kelley for coal made and delivered at the Alabama Furnace, said Robbs & Bros. chopping their own wood and doing all the work in every way and delivering as fast and in the same manner S. C. Kelley & Co. agreed to with the said Alabama Iron Co., seven cents per bushel, the same measurement that S. C. Kelley & Co. gets of the Alabama Iron Co.; and as follows, one dollar and sixty cents per hundred, is to be kept back in the hands of S. C. Kelley & Co. for the faithful compliance of the job between the said Robbs & Bros. and S. C. Kelley, and if said job is faithfully completed, then enough of said one dollar and sixty cents per hundred is to be paid to said S. C. Kelley to liquidate any indebtedness to said S. C.

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Kelley from Robbs & Bros. or any indebtedness that should be unpaid to said E. B. Nelson; then any balance will go to Robbs & Bros. or to said Street, if so directed by said Robbs & Bros., and two dollars and seventy cents per hundred on all the coal said Robbs & Bros. deliver will be held by said E. B. Nelson to pay and to appropriate on the indebtedness from said Robbs & Bros. to said E. B. Nelson, the remaining two dollars and seventy cents per hundred the said E. B. Nelson agrees to pay over to the said Street for said Robbs & Bros. by the consent. It is further agreed and understood by all parties interested, that the said E. B. Nelson or the firm of S. C. Kelley & Co. are in no way either directly or indirectly responsible for any such supplies or money so furnished to said Robbs & Bros. by said Street, only to the extent of two dollars and seventy cents per hundred bushels, until the account the said E. B. Nelson holds against said Robbs & Bros. which they agree is correct is paid up in full, and then and after that date to the amount of five dollars and forty cents per hundred bushels coal delivered on the Alabama Iron Co.'s stock bank as required by contract with S. C. Kelley & Co. with the Alabama Iron Co.; and then, and only in the event that the said Street furnishes the necessary supplies and funds to keep as much wood cut and on hand at all times as there now is in said job, and as much wood and coal on hearths as there now is, and then to be paid by consent of said Robbs & Bros.; and it is further understood and agreed by all parties interested to this contract, by said Street making said advances of supplies to said Robbs & Bros. that it does not create any lien upon said wood, or job, or coal in any way, only to the extent before mentioned, but all such wood, stock and coal is to belong to the said S. C. Kelley & Co., and to be applied on their contract with said Alabama Iron Co., nor does this contract in any way interfere with the contract heretofore made by and between the said Robbs & Bros. and S. C. Kelley, and the said S. C. Kelley or S. C. Kelley & Co. shall have the same right as heretofore to take possession of said job and complete it, in event of said Robbs & Bros.' failure to do so, as agreed between them and S. C. Kelley.

"Witness our hands this 13th day of March, A. D. 1875.

"A. J. STREET,

"E. B. NELSON.

"Witnesses: S. A. Deavenport, B. W. Nunis."

The plaintiff also testified that he proceeded to furnish supplies to Robbs & Bros., according to this contract; that it

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really was made, orally, about eight days prior to the 13th of March, when it was reduced to writing. And that, from the day on which it was orally made, he had furnished Robbs & Bros. with supplies and money. That the articles and money so supplied amounted, on the 16th of April, 1875, to fifteen hundred and forty-five dollars. The witness charged the merchandise and money furnished by him to the account of S. C. Kelley & Co. He also said, on cross-examination, that "the written contract was all the authority he had for charging the goods furnished to Robb & Bros. to S. C. Kelley & Co., and the defendants had never paid him anything for or on account of said supplies and money furnished the said Robbs & Bros." He also stated that the supplies and money furnished by him "were enough to have enabled the said Robbs & Bros. to keep more wood on the hearths than was there when he began to furnish them, and enough to have enabled them to do all he had contracted with said E. B. Nelson to enable said Robbs & Bros. to do, and that said Robbs & Bros. had given witness their consent that S. C. Kelley & Co. should pay witness," according to said contract.

The defendants introduced evidence tending to show that the plaintiff had not furnished supplies according to the contract, and that Robbs & Bros. had not given their consent to S. C. Kelley & Co. for the payment of the plaintiff, but had expressly forbidden them so to do.

The court, on the request of the defendants, charged the jury, "that if they believed all the evidence in the case they must find a verdict in favor of the defendants." To this charge the plaintiff excepted.

TAUL BRADFORD, for appellant.

J. T. HEFLIN, and L. E. PARSONS, for appellees.

STONE, J.—The complaint in the present record contains only the common counts. Many pleas were filed, demurrers to which were overruled. And several replications were then filed to the pleas, demurrers to which were sustained. The whole case, according to the proof, very properly turned on the plea of *non assumpsit*; and, as we think no special pleas were necessary, and no result was, or could have been brought about by their interposition, we will not consider the rulings on demurrer.

The contract, out of which this suit grew, is certainly a

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very unusual, if not a very loose one. It shows confidence on Mr. Street's part, bordering on credulity; and, forming our opinion on the evidence furnished by this record, his confidence has been greatly abused. Few, if any contracts have come before us, by which one party has bound himself to the extent the appellant seems to have done, and yet surrendered to others well nigh all security for his reimbursement. He was to furnish supplies in merchandise and money, approximating eight hundred or one thousand dollars per month, to parties who, from appearances, had no other means of paying him than the products of their labor, thus supplied and sustained by his means; say, some twelve hundred dollars per month; and at the same time consenting that sixty per cent. of such products should be withheld, and two-thirds of that sum consumed in other uses. As to the remaining forty per cent., his only claim was, to receive it, if the parties, to whom he furnished the supplies, consented thereto. Thus providing inadequate security in any event, and leaving that to the option or caprice of his debtor. The contract expressly releases E. B. Nelson, the person contracting with him, and S. C. Kelley & Co., represented by E. B. Nelson, from all personal liability; releases the charcoal to be produced—(the business of the enterprise)—from all lien or claim; and for a time, the duration of which neither the contract nor the evidence furnishes any means of determining, consents to look to forty per cent. of the products for Street's reimbursement, "if so directed by said Robbs brothers," the persons advanced to, or, if paid "by their consent." They refused to give their consent, but for some reason not explained satisfactorily, forbade Nelson to pay Street anything. The reason given by them was, that Street had failed to furnish supplies according to contract. According to the testimony, he had furnished over fifteen hundred dollars in forty days.

The theory on which it is claimed this suit can be maintained is, that Street can sue for the value of the merchandise and money furnished, because the contract has been violated and broken on the other side. If Nelson, or S. C. Kelley & Co. were personally bound for the performance of the contract made by Robbs Brothers, this might be the case. So far from this being so, the contract, as we have seen, not only does not bind them, but prohibits Nelson from paying Street, without the consent of Robbs Brothers. If Nelson, or Kelly & Co., committed any fault, breach of contract, or of duty in this transaction, the record fails to show it.

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Under the facts shown in this record, the plaintiff never can recover; and if the Circuit Court had even erred in the rulings on demurrer, or in receiving evidence, it is error without injury, and furnishes no ground for reversal.—1 Brick. Dig. 780, §§ 96, 97.

The judgment of the Circuit Court is affirmed.

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A Settlement of Partnership Accounts.

1. *The entries in the books of a partnership are presumed to be correct.* The books of a commercial partnership, and the entries therein, when all the members have free access to them, are evidence for and against the several partners in settling the partnership accounts. The entries are presumed to be correct until the contrary is shown.

2. *Books of partnership are evidence for and against the partners.*—In a suit for the settlement of partnership accounts, the register on a reference, should receive such books as evidence for and against all the partners.

3. *Books produced at the instance of complainant, are evidence against him.*—When a bill requires a defendant to produce books and papers in his possession, for the purposes of an account, on production, they become evidence against the complainant.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. ADAM C. FELDER.

The facts are stated in the opinion.

GAMBLE & POWELL, and WATTS & WATTS, for appellants.

HERBERT & BUELL, for appellees.

BRICKELL, C. J.—The main question presented by the record, is one of fact, to ascertain from the evidence, whether any indebtedness, and if any, the amount thereof, is owing by the testator of the appellants to the appellees. The testator, Monroe P. Watts, the appellee John H. Bostwick, and James A. Branch, the intestate of the appellee Berry, were for a few months, from the fall of 1865, to the 17th day of March, 1866, partners doing a general commission business in the city of Mobile. The partnership was dissolved, and Watts was left in possession of the partnership books, and assets, having exclusive authority to settle its affairs. By the terms of the partnership, he was entitled to one-half of the

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net profits, and Branch and Bostwick to one-fourth each. The partnership debts were paid, and the partnership assets reduced to money by Watts, after the dissolution. The bill is filed for a settlement of the partnership accounts, and the ascertainment of the balance due from Watts to Branch and Bostwick, which is averred to be two thousand and two 87-100 dollars. The total net profits, it is averred, up to the time of the death of Watts, was nine thousand eight hundred and sixty 30-100 dollars, subject to a deduction in favor of Watts, of two thousand nine hundred and twenty-seven 28-100 dollars, for advances to the partnership made by him. The answer denies this averment, avers there were none, or very inconsiderable profits made by the partnership, and exhibits an account of the debits and credits, against and for Watts as shown by the partnership books, which show a balance against him of less than thirty dollars. The cause was referred to the register to take and state an account between the parties. Finding it difficult to state the account, in accordance with the directions of the chancellor, he reported there was a balance due from Watts, to the appellees, on the second day of June, 1868, of two thousand and two 87-100 dollars, which with interest to the making of the report, amounted to two thousand nine hundred and twenty-four 19-100 dollars. The register founded his conclusions on the evidence of one Underhill exclusively, regarding it as the most satisfactory, and disregarded the partnership books, because as he supposed they were unintelligible. The report was confirmed by the chancellor.

The book of a commercial partnership, and the entries therein, when all the members have free access to them, are evidence for and against the several partners in settling the partnership accounts. The entries are presumed correct until the contrary is shown.—*Desha & Sheppard v. Smith*, 20 Ala. 747. It is shown very satisfactorily, that after the dissolution, each partner had free access to the partnership books, though they were in the possession of Watts. The entries on these books were made generally by Bostwick, who states in his deposition, that after the dissolution, he went to Watts' office every day or two, "to write up the unfinished business." These books should have been received by the register, as evidence for and against all the partners. Moreover, it is averred in the bill, these books are in possession of the defendants, and they are required to produce them. When a bill requires a defendant to produce books and papers for the purposes of an account, on production, they become

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evidence against the complainant.—*Powell v. Powell*, 7 Ala. 582; *May v. Barnard*, 20 Ala. 200; *Tarleton v. Goldthwaite*, 23 Ala. 346. The register was in error, in not taking the partnership books as *prima facie* correct. The separate books of Watts, were not proper evidence against the appellees, unless it had been shown they had assented to the correctness of the entries therein; or they had introduced them in evidence, when they must have been taken as *prima facie* correct, not only so far as they charged, but also, so far as they discharged Watts, or charged the appellees.

As we understand the evidence, if the partnership accounts had been stated from the partnership books, no balance, or if any, a very inconsiderable balance, would have been found due from Watts to the appellees. The evidence of Underhill, is the only evidence on which it is claimed that such balance exists. He was twice examined—once by deposition, and then orally before the register, the examination being reduced to writing, and accompanying the register's report. In his deposition he says: "I was more than once desired by M. P. Watts to make up a statement of the amount he owed on settlement to Bostwick, and Branch's estate. I did so several times. I forgot the balance I made out to Branch's credit. Bostwick's balance was I think between \$2,000 and \$3,000, and I have always said so. The statements which I made up on at least two several occasions were always placed by Mr. Watts in his pocket-book." We can not understand this statement as meaning more or less than that the witness ascertained from the books, and other sources of information, whatever they may have been, which were accessible to him, the balance due to Branch, and the balance due to Bostwick separately. There was no ascertainment, and no effort to ascertain any balance as due them jointly. It is too uncertain, and too indefinite to sustain any claim on the part of Branch.—*Watson v. Byers*, 6 Ala. 393; *Baxley v. Gayle*, 19 Ala. 151. As to Bostwick, it may satisfy the mind, that there was a balance due him as ascertained by the witness, of not less than two thousand dollars. In his examination before the register, the witness says, testifying in reference to the same matter: "While I was in his employment in April or May, 1868, I made out the account three times I think, and gave it to Mr. Watts. The balance due Branch & Bostwick was between twenty-one and twenty-two hundred dollars, according to the best of my recollection, and I made this account in consequence of Mr. Watts telling me to take the books, and make out such account as

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I thought correct, and in making such account I left out such items as I thought ought not to be included, and the item which Mr. Watts acknowledged was incorrect of \$62 20-100." The inconsistency in these statements is apparent, and is unexplained. If the last is to be accepted, the balance ascertained was due to Branch and Bostwick jointly,—there was not a separate, different balance due each. The fact is, that after these statements were made, there were entries made on the books, which changed entirely the state of accounts, and which, if correct, show the balance due from Watts is inconsiderable, and of the balance he would be entitled to one-half leaving due to Bostwick and Branch less than twenty dollars. The books and the entries thereon, must be taken as *prima facie* correct. Especially must they be so taken in this case, as it is shown the only entries now in dispute were called to the attention of Bostwick, at or about the time they were made, and he objected to but one, which Watts agreed should be corrected. Another fact not without significance, is, that at first the amount of net profits, was by the appellees stated at the precise sum of three thousand forty-two dollars, of which one-half amounting to fifteen hundred and twenty-one dollars, was claimed. This balance is said to have been ascertained from the books, which were produced before the register; yet no effort was made on the reference to the register, to point out the mode in which it was ascertained. The bill avers the balance due the appellees jointly, of which each is entitled to one-half, was two thousand and two 87-100 dollars—that the net profits were nine thousand eight hundred and sixty 30-100 dollars, subject to a deduction for advances made by Watts, of two thousand nine hundred and twenty-seven 38-100 dollars. If the appellees are not proceeding on mere conjecture, they must have had some *data*, from which they were enabled to aver with such precision the amount of the net profits, the deduction to be made from them, leaving the balance due from Watts to them the matter of arithmetical calculation. If they had such *data*, no evidence thereof has been given; and the right of recovery has been rested alone on the evidence of Underhill. It is not insisted they had not the means of showing on the hearing, or on the references before the register, how and from what sources these precise sums were ascertained. The presumption can not be indulged, that the averments proceeded from mere conjecture; and if that presumption was indulged, the appellees would stand in a scarcely less favorable attitude, than they must stand now, that of with-

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holding evidence, they could and should have introduced. The burden of proof rests on the appellees, they must show by evidence generating a clear, rational belief, that on a settlement of partnership accounts, the testator of appellant is indebted to them. The evidence now found in the record does not support the conclusions of the register, and the exceptions to his report should have been sustained. The partnership books should have been accepted as *prima facie* correct. The duty of pointing out errors in them, rested on the appellees. If such errors are shown, they should be corrected in stating the accounts.

The decree must be reversed and the cause remanded.

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The Settlement of a Guardianship.

1. *A covenant not to sue releases the debtor.*—A covenant by a creditor not to sue his debtor operates as a release.

2. *An error in the description of the decree does not invalidate the bond of indemnity.*—A bond of indemnity which recited that a decree had been rendered against a guardian and his sureties, when it had been rendered only against the guardian, is not void on this account. The error is immaterial.

3. *When a debtor becomes a trustee entitled to collect a debt, the presumption of its payment is conclusive.*—When a person is a debtor, and as administrator, or other trustee becomes the creditor entitled to receive payment of the debt, it will be conclusively presumed that he has paid himself. But when such a person is merely a surety, the presumption does not arise until the time of settlement.

4. *The nature of legal presumptions.*—Legal presumptions are, like legal fictions, to be adopted only to promote justice, not to defeat it, and the lawful acts and intentions of parties. And a surety upon a guardian's bond, who succeeds his principal as guardian, will not be presumed to have paid himself the amount of the decree against his predecessor, the moment he enters upon the duties of his office.

APPEAL from the Probate Court of Montgomery.

Tried before the Hon. C. W. BUCKLEY.

The facts are stated in the opinion.

D. S. TROY, for appellant.

WATTS & SONS, and RICE, JONES & WILEY, for appellee.

1. The appellant has no equity. The decree rendered in October, 1867, is conclusive against both Flinn and Thomas

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R. Carter.—41 Ala. 203; 53 Ala. 615. The latter case is directly in point. The fact that Thomas R. Carter was insolvent at the time of the decree, although Flinn did not know of his insolvency, gives him no equity.—4 Ala. 693; 56 Ala. 393.

2. If Thomas R. Carter paid to his son part of what Flinn owed him as guardian, it was a good payment, and Flinn could have availed himself of it on his final settlement. As Flinn is made liable, by reason of being the surety of Thomas R. Carter, the former guardian, of course, a payment made to the ward, by the former guardian, was a discharge of Flinn's liability to that extent.—14 Ala. 419-47; 47 Ala. 257.

3. Let us concede that the decree of the Probate Court against Thomas R. Carter, as guardian, in favor of Flinn, was illegal, as is alleged by Flinn in his bill, then it is very clear that Flinn, as the succeeding guardian, when cited to settle his accounts, should have proved the invalidity of the said decree. But instead of doing so, he allowed a decree to be entered against him without using any diligence to protect himself. It is upon this manifest negligence that he founds his title to relief from the decree against himself. Such negligence deprives him of the relief prayed for. "Nothing but conscience, good faith and *reasonable diligence* can call forth the court of equity into activity. Where these are wanting, this court is passive, and does nothing."—5 Ala. 90; 30 Ala. 270, and cases cited; 20 Ala. 826. The jurisdiction of courts of equity, in matters of administration, is as well settled as over guardians.—20 Ala. 676-677.

4. The bill fails to show whether the grounds for alleged credits occurred before or after the decree against Flinn in the Court of Probate. The intendment is against him. If these grounds occurred before that decree, he should have availed himself of them in the Probate Court.

MANNING, J.—Thomas R. Carter, father of appellee, William H. Carter, became in April, 1864, guardian of the latter and of his two other minor children,—giving a bond as guardian, upon which appellant, Bunberry Flinn, and Watson Flinn became his sureties. And on the same day, Carter, the guardian, filed an inventory setting forth that he had received from himself as administrator of some estates, \$2,606 43-100 for his three wards, who were also his children. This sum he as guardian, received from himself as administrator in the currency of the late Confederate States; twenty dollars of which was then, equal to only one dollar in coin.

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In July, 1867, Thomas R. Carter made application to the Probate Court to settle finally his guardianship for his wards,—who were still minors; to which end proceedings were instituted by him. In October following, the court accepted his resignation of the guardianship, and Bunberry Flinn (the appellant) was at the same time appointed and gave bond as guardian of the same wards,—Thomas R. Carter, becoming a surety on his bond; and on the same day, decrees were rendered upon Thomas R. Carter's statement of his indebtedness to his wards against him, for the whole amount of the Confederate currency as so much good money, with compound interest thereon; each of the three decrees, being for the sum of \$1,056 6-100 recovered in the names of the wards, respectively, by Bunberry Flinn, their guardian. Flinn as surety for Carter, thus became liable for the amounts of these decrees. But as guardian he never, in fact, received any of this money.

In 1876, appellee, Wm. H. Carter, who had become of age several years before filed his petition praying that Flinn be brought to a settlement of his guardianship, and charged with the amount of the decree rendered as aforesaid in favor of petitioner with compound interest thereon. There was no other estate of the ward than this to be accounted for. Flinn among other defences, set up as a release or bar a bond executed in March, 1873, by Thomas R. Carter, his wife Mary J. Carter, the said William H. Carter, and one Callaway, who had married one of the other wards, by which instrument, and in consideration of Flinn's becoming surety for Callaway, (son-in-law of two, and brother-in-law of the other of the Carters,) upon his four promissory notes for \$2,000 each, payable in one to four years, successively, to Josiah Morris, the obligors bound themselves to hold Bunberry and W. Flinn "harmless and free from all liability whatever by reason of their suretyship on said guardian's bond, and by reason of said judgments rendered against them." The bond here referred to is that for Thomas R. Carter's guardianship; and the judgments are the decrees above mentioned; all of which are particularly mentioned in the bond of the Carters and Callaway.

1. A covenant by a creditor not to sue his debtor shall operate as a release. "And this construction has been made to avoid circuity of action; for if in such a case, the party should contrary to his covenant, sue, the other party would recover precisely the same damages which he sustained by the other's suing."—8 Bac. Abr. (by Bouv.) 248: "Release

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A." Upon the dissolution of a partnership, one partner; A took the obligation of the other, B, which C, a creditor of the firm also executed as surety for B, to pay all the debts of the partnership, (whereby A was of course to be kept harmless.) It was held that this operated as a release of A from a demand of C's against the firm.—*McNeal v. Blackburn*, 7 Dana (Ky.) 170.

The case in hand is very much like the one cited. By the bond of the Carters and Callaway, they bind themselves to hold Flinn harmless by reason of his suretyship on Carter's bond as guardian, "and by reason of said judgments," one of which is in favor of Wm. H. Carter, who also executed the bond set up in bar. This bond may therefore be insisted on as a release, unless some of the other objections made to it be valid.

2. The becoming bound as surety for Callaway, upon his notes for \$8,000, to Morris, and enabling Callaway to purchase and obtain a large tract of land constitute a sufficient consideration on the part of Flinn, for the bond to hold him harmless. There was benefit to Callaway, and the detriment to Flinn of assuming the contingent duty of paying a large sum of money.

3. The bond in question specifically mentions the guardianship bond of Thos. R. Carter, by date, amount and names of obligors, including Bunberry Flinn and W. Flinn, and the date, and names of plaintiffs, and amounts of the decrees of the Probate Court in favor of the wards, respectively against their former guardian, describing them as "rendered against the said Thos. R. Carter, as such guardian by said court, and against his sureties as such." The writer of the bond was doubtless led to describe the judgment as against the sureties also, because the law provided that upon decrees or judgments against guardians, "executions may issue against them and their sureties upon their bonds."—Revised Code, § 2450 (2040). The objection that the bond in question is void or ineffectual because of that immaterial error in description, can not be sustained.

4. The argument that the appellant, Flinn, is chargeable with having in fact and before the bond to him was executed, received payment of the decrees or of a large part of them, from Thos. R. Carter, is not supported by the evidence; and the bond recites, (what nobody was better qualified than the obligors, to certify,) that "said judgments are yet unsatisfied."

5. It is ingeniously insisted that the bond of the Carters

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and Callaway stipulated to hold Flinn harmless, only from what he was liable for by reason of his suretyship for the elder Carter and from the decree against the latter, his principal, and not from what he owed *as guardian*; and that by presumption of law, Flinn upon becoming guardian and upon the rendition, on the same day, of the decree, then paid the amount of the decree to himself; and that having thus received *it as guardian*, he was not discharged.

It is true that in certain cases where a party is a debtor or responsible for a debt, and in the capacity of administrator, or otherwise, in trust for others, becomes the creditor to whom payment of the debt is to be made, it will be conclusively presumed when he is brought to a settlement, that he has received payment from himself. The fact may be, though, as the courts well know, that such payment has not been made: and the parties are free to deal with each other in the meantime, according to the real fact. And where another is the principal debtor, and the person who as administrator, or in some other capacity becomes entitled to receive payment of the debt, is only a surety, he has the right as such administrator, or in such other capacity, to collect it from the principal: and no presumption that he has paid it to himself will make void his arrangements to that end with the parties concerned.

Legal presumptions should, like legal fictions, be adopted only to promote justice not to defeat it, and not to defeat the lawful acts and intentions of parties who are *sui juris*. The bond executed to Flinn would by such reasoning, be made of no effect; and the argument is founded on an erroneous assumption. Flinn was not bound to pay himself the amount of the decree in question, the moment he became guardian and the decree was rendered. He had a right at any time during the guardianship, to make the amount out of Thos. R. Carter the former guardian and his principal, he himself being chargeable with it only upon settlement. And since before settlement was required, and when the decree was wholly unsatisfied, the party to whom it was due, with a knowledge of all the facts, released Flinn, the courts will not in order to defeat the release, presume that to have been done which was not done, and which the parties, in the instrument operating as a release, say was not done.

It is unnecessary to decide any other of the questions that were discussed by counsel.

The judgment of the Probate Court of Montgomery county in this cause must be reversed and set aside; and this court

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proceeding to render the judgment which that court should have rendered, it must be further adjudged and decreed that said Bunberry Flinn has been and is released of and from all liability on account of his guardianship of the said William H. Carter, to said Carter, and that said Flinn be forever discharged and exonerated from all liability to said Carter on account thereof, and recover of said William H. Carter the costs of this cause in this court and in the Probate Court.

Teague v. Wade.

Vendor's Lien.

1. *A bill is not demurrable because it fails to allege the vendor had a good title.*—A bill to enforce a vendor's lien, which avers that the defendant entered into and retains possession of the land under the contract of purchase, and that he accepted the vendor's bond conditioned to make title upon payment of the purchase-money, and that it is due and unpaid, is not demurrable because it does not allege that the vendor had a good title.

2. *It is sufficient if the vendor have a title when the vendee can demand a deed of conveyance.*—When the vendee knew the condition of the title at the time of his purchase, and that his vendor had not fully paid for the land, any charge or presumption of fraud based on that ground, will be repelled. It is sufficient if the vendor have title when the vendee is in condition to demand a deed of conveyance.

APPEAL from the Chancery Court of Cherokee.

Heard before the Hon. N. S. GRAHAM.

The facts are stated in the opinion.

M. J. TURNLEY, and CLOPTON, HERBERT & CHAMBERS, for appellant.

J. B. WALDEN, for appellee.—1. This is a bill to enforce a vendor's lien. The answer of the respondent, in the nature of a cross-bill, shows his knowledge at the time of his purchase of existing incumbrances on the land, and in his deposition he admits notice of defects in the title of the vendor before the sale was completed. The respondent is not entitled to the relief asked.—3 Stew. 233; 8 Ala. 373; 7 Ala. 71.

2. The record does not show that the money was paid into court; nor does the ability of respondent certainly to pay appear from the evidence.—12 Ala. 37.

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STONE, J.—The present is a bill to enforce a vendor's lien. It avers that complainant sold the land in controversy to defendant, gave him bond to make him title when the purchase-money, nine hundred dollars, was paid, and put him in possession of the lands—and that he still remains in possession. It then avers that Teague, the defendant, had paid only thirteen dollars of the purchase-money, although three years had elapsed between the making of the contract and the filing of the bill, and the three installments of the purchase-money were all past due. The bill contains no averment that the vendor had a good title, and the absence of this averment is assigned as a ground of demurrer.

In the case of *McLeroy v. Tulate*, 34 Ala. 78, a bill to recover purchase-money by enforcing the vendor's lien, it was ruled to be necessary to aver that the vendor was able, ready and willing to make full performance of the conditions of the contract on his part. But that decision was rested on the peculiar stipulations of the contract of sale and purchase. It was an agreement to sell at a future time, at an agreed price—the payment and conveyance to be cotemporaneous—and was signed by both parties. This court ruled that the covenants were dependent, and that to maintain a suit by either, he must aver performance, or an offer to perform, or an ability and willingness to perform his part of the contract. Such, however, is not the rule in ordinary suits to enforce a vendor's lien. In most of our decisions on this question, the bills contained no such averments.

In *May v. Lewis*, 22 Ala. 646, this court, speaking of the essential averments in a bill like the present one, said: "Here the allegations of the bill show the contract for the sale of the lands; that the vendor retained the title in himself, as security for the purchase-money; that the purchase-money is due, and the purchasers in default. These facts are all which are necessary to authorize a court of chancery to enforce a vendor's lien on land for the purchase-money."—See also *Haley v. Bennett*, 5 Por. 452; *Chapman v. Chunn*, 5 Ala. 397; *McLemore v. Mabson*, 20 Ala. 137.

Another principle should not be overlooked in this case. It is averred and proved, that when Teague purchased, he knew the condition of the title, and that part of the purchase-money due from his vendor, Wade, remained unpaid. This repels all imputation of fraud, if any were charged. In such case, it is enough if vendor have title, when the purchaser puts himself in condition to demand a conveyance.—*Harris*

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v. Carter, 3 Stew. 233; *Beck v. Simmons*, 7 Ala. 71; *Barnett v. Gaines*, 8 Ala. 373.

The averments of the present bill are sufficient, and the demurrer was rightly overruled.

It is averred in defence of this suit that the vendor's title to a part of the land is insufficient, and that he is unable to respond in damages. The land, as to which this defence is attempted, is the south-west quarter of section sixteen. We know, as matter of law, that the sections numbered sixteen, with some exceptions founded on special reasons, were originally school lands, the title to which was in the State, as a trustee to carry out the purposes of the grant. The title to this particular tract seems never to have passed out of the State by grant. We think, however, there was a failure to prove that the purchase-money is unpaid; and, under the facts of this case, we do not feel justified in finding that any of the purchase-money remains unpaid. The note for the purchase-money was put in judgment in the spring of 1866. Two executions appear to have been issued; the last, November 23d, 1866. This was returned January 7th, 1867, with a partial credit indorsed; and from that time to the present, there does not appear to have been any attempt made to enforce the collection of the judgment, or to disturb any one in the possession and enjoyment of the land. Add to this the testimony of Bradford, corroborative of the presumption of payment, and we think the chancellor rightly ruled that the defence was not made out.

Decree affirmed.

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The Establishment of a Public Road.

1. *The Court of County Commissioners has quasi legislative power.*—The Court of County Commissioners in reference to the establishment and change of public roads exercises a *quasi* legislative authority, which other tribunals will not revise or control, unless its action injures or interferes with rights of property.

2. *Its records must show jurisdiction.*—The court is of limited statutory authority, and to support its proceedings when assailed on *certiorari*, its records must affirmatively show jurisdiction.

3. *After its action a right to writ of certiorari is complete.*—After the

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court orders the change of a road, appoints viewers and accepts their report, the right of a person aggrieved, to a *certiorari* is complete; and the court in its return should certify its records as they existed when the writ was issued, and not a record subsequently made whose validity has not been questioned.

4. *The Court of County Commissioners can amend its records.*—The Commissioners' Court, like every court of record has power to amend its records *nunc pro tunc*, if there be matter of record, that authorizes the amendment.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JAMES Q. SMITH.

Joseph T. Hearne filed a petition in the Circuit Court of Lowndes county, praying that a writ of *certiorari* be issued to the Court of County Commissioners of the said county, requiring it to certify the record of its proceedings "in the matter of the change of route of the public road, leading from Lowndesboro' to the Montgomery and Benton road, and that all action on the decree for the change of the said road be suspended."

The record shows that on the petition of a large number of persons the Court of County Commissioners appointed eleven citizens "to view and mark out a new route for a portion of the Vernon road lying between Lowndesboro' and the Cross Roads on the Telegraph road, commencing at a point on said Vernon road on the level beyond R. W. Russell's residence, thence through the land of said Russell to a point at or near the intersection of the road leading to Montgomery; thence in same direction through the lands of Dr. J. T. Hearne, passing to the right of the residence on said lands; thence to the lands of Mary McCall; thence to the best and most practicable route to the Cross Roads."

On the 23d day of February, 1875, the persons appointed by the Court of County Commissioners on a previous day, made this report:

"The State of Alabama, Lowndes county. To the Honorable Commissioners Court of Lowndes county: We, the undersigned, appointed by your honorable court as a jury to view and mark out a new road, changing the road known as the Vernon road, lying between Lowndesboro' and the Cross Roads, beg leave to make the following report: According to notice to meet on Thursday, 23d inst., we assembled at the place for locating the road, three of the jurymen appointed by your court being absent, to-wit: T. L. Farris, E. P. Holcombe and Pitt Tyson, three other free or householders were substituted in their places, to-wit: W. Bohley, C. Robinson and J. P. Wilson, and after being duly sworn proceeded to view and examine the location of said change proposed in

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your said commission, and found the ground over which it would pass practicable and an improvement over the old route, and therefore proceeded to stake off said new route, following the route of your said commission, commencing at the point designated in the commission, passing through the lands of R. W. Russell, thence across the lands of J. T. Hearne, thence across the lands of Mary McCall, selecting the best and most suitable route for the road, with a view to the least damage to the owners of land, and intersecting the old road at the Cross Roads."

On the first day of July, 1875, the Hon. James Q. Smith, circuit judge, issued an order, upon the petition of J. T. Hearne, presented on the 28th day of June, 1875, to the clerk of the Circuit Court of Lowndes county in the following terms:

"Upon the petitioner, J. T. Hearne, entering into bond with sufficient securities, in the sum of one hundred dollars, conditioned to pay all such costs and damages as the Court of County Commissioners of Lowndes county may suffer from suing out of said writ, and to pay such judgment as to costs as may be rendered against him by the Circuit Court, you will issue the writ of *certiorari* directed to the Court of County Commissioners of Lowndes county, commanding them to send up the record of their proceedings in the matter of the petition of D. McCall and others, for a change of location of a portion of the public road leading from Lowndesboro to the Montgomery and Benton road, to the said Circuit Court, and to stay all proceedings in said case until the further orders of this court."

The petitioner complied with the condition of the order, and the writ of *certiorari* was issued in pursuance of it on the seventh day of July, 1875. It was received in the sheriff's office on the ninth of that month, and was executed on all the members of the Court of County Commissioners, except J. V. McDuffie, on the 20th of July, 1875.

The subsequent proceedings of the Court of County Commissioners clearly appear in the opinion of the court.

WATTS & SONS, and COX & HOUGHTON, for appellant.
1. If any part of the record shows the court had jurisdiction, this is sufficient.—29 Ala. 9. The recitals in the record are sufficient to show the jurisdiction.—34 Ala. 461; 15 Ala. —. The statute prescribes what is necessary to give the court jurisdiction.—Code, §§ 1312, 1313. But it is not necessary that all the facts prescribed by the statute

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should appear in the petition.—50 Ala. 549; 29 Ala. 9. All reasonable presumption will be made in favor of a court on a matter within its jurisdiction.—18 Ala. 176.

2. The failure to recite in the order appointing ten persons that seven of them were disinterested householders of the county, did not affect the jurisdiction of the court, it was merely an irregularity.—34 Ala. 461. When a number of persons are appointed to perform a public duty a majority of them may act.

ELMORE & GUNTER, for appellee.—1. Three things are necessary to give a Commissioners Court jurisdiction to establish a road must appear in its record, viz: 1. An application to the court by petition. 2. Thirty days notice of the application by advertisement at the court-house door, and three other public places in the county; two of which shall be in the immediate neighborhood of the road sought to be established, changed, or discontinued. 3. The location of the road in the county.—Rev. Code, § 1312; 15 Ala. 134, 829; 18 Ala. 694; 22 Ala. 484; 25 Ala. 480; 26 Ala. 568; 34 Ala. 461.

2. It is not sufficient that the record should state that due and legal notice was given. This is a conclusion of law and not the statement of a fact.—22 Ala. 484; 26 ib. 568. Neither waiver, appearance nor consent can confer jurisdiction on the court, nor failure of party to object.—3 Ala. 670; 18 Ala. 694.

3. The record does not show that the proper notice was given, or that the road was in Lowndes county. This was attempted to be cured by an order after the writ of *certiorari* had issued and served on the commissioners, except the judge of probate. This order can not be considered as any part of the record or the proceedings brought up on the return of the writ of *certiorari*. None will be considered which were rendered after the service of the writ on the four commissioners, except an amendment of the previous proceeding *nunc pro tunc*.—44 Ala. 252.

4. This order is not, nor does it technically or substantially purport to be the correction of previous proceedings *nunc pro tunc*. It refers to no record, nor to matter *quasi* of record by which it is entered. It is a mere recital of what the court said when it made the entry of what had taken place at the previous terms of the court. This, therefore, is not an amendment *nunc pro tunc*, and can not be considered as part of the record.

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BRICKELL, C. J.—The continuous course of decision from an early day has been, that the Court of County Commissioners in reference to the establishment and change of public roads, exercises a *quasi* legislative authority, which other tribunals will not assume to revise or control, unless its action is productive of injury to, or interference with the rights of property of individuals. If in the establishment, or the change of a public road, the lands of a private person are to be taken, he has an individual interest involved, and on *certiorari*, the Circuit Court will at his instance inquire into the legality and regularity of the proceedings of the Commissioners Court. The court is of limited, statutory jurisdiction, and to support its proceedings when assailed on *certiorari*, its records must affirmatively show jurisdiction. Three things are essential to its jurisdiction, to establish or change a public road—the location of the road within the county—an application in writing for the proposed establishment, or change, of which notice for thirty days, must have been given by advertisement at the court-house door of the county, and three other public places, two of which must be in the immediate neighborhood of the road. Unless the record affirmatively discloses the existence of each and all these things, on *certiorari*, the orders of the court can not be sustained. An affirmation in the record that due or legal notice, or proper notice has been given, is not the statement of a fact, but rather a conclusion of law, and as intendments can not be made to support the jurisdiction, will not sustain the order of the court.—*Molett v. Keenan*, 22 Ala. 484; *Keenan v. Commr's Court*, 26 Ala. 568.

The record of the Commissioners Court, when the *certiorari* was sued out, and until service had been made on every member of the court, except the probate judge, did not disclose that the road, the route of which it was proposed to change so that it would pass through the lands of the appellee, was situate in Lowndes county; nor did it disclose that notice of the application for the change had been given, otherwise than by the general statement, that *it was shown to the satisfaction of the court, that the proper legal notice of application to change said road had been given*. Viewers had been appointed to mark and locate the road as the change was proposed, who had acted, reported their action, and their report had been confirmed. The overseer was directed, (after the issue of the writ of *certiorari*,) by the probate judge to open the road as the change had been ordered, and the day after the service of the writ on the commissioners he makes return

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of the order, and singularly in that return, affirms that about which the record was silent, *that the road lies in Lowndes county*. There is also found in the record, an order confirming the report of the overseer, which contains a recital of every fact essential to the jurisdiction of the court, and the regularity of its proceedings. This order also states in substance that the matter of the application for the change of the road had been continued until the day of the making of the order, which was a regular term of the court. After the court had ordered the change of the road, appointed viewers to mark out the road as changed, and they had made report which the court had accepted, the only duty of the court was to make an order for the opening of such road. It is not contemplated by the statutes that there shall be any confirmation by the court of the action of the overseer. We will not say such confirmation is irregular, or improper. But after the court had ordered the change of the road, appointed viewers, and accepted their report, the right of the petitioner to a *certiorari* for the revision of their proceeding, was complete.—*Smith v. Commr's Court*, 1 Stew. 183. The *certiorari* which was issued, was a command that the court should certify its records as they existed, at the time of its issue, and not a record subsequently made, the validity of which was not questioned. Beside, the mandate of the circuit judge granting the writ of *certiorari*, directed a stay of all proceedings until the further order of the Circuit Court. This subsequent proceeding, was in direct violation of and contempt of this mandate. It was competent for the Commissioners Court, as it is for every court of record, to amend its records *nunc pro tunc*, if there be matter of record, authorizing the amendment. And on a proper application, supported by proper proof, the Circuit Court would doubtless have modified the order for the stay of proceedings, that such amendment should be made, and would have authorized a further return to the *certiorari*, to embrace the amendment, if properly made. This subsequent entry of record, coming as it does under questionable circumstances, not a part of the record when the *certiorari* issued, made in violation of the order of the judge granting the writ, was properly disregarded by the Circuit Court. Disregarding it, the record does not disclose the jurisdiction of the Court of County Commissioners, and its order was properly reversed.

Let the judgment be affirmed.

STONE, J., not sitting.

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[Saffold v. Powell.]

Saffold v. Powell et al.*Swamp and Overflowed Lands.*

1. *The agents of the "swamp and overflowed lands" are entitled to equal compensation.*—The agents appointed by the Governor of the State in 1860 to "select and determine by proof the swamp and overflowed lands within the limits of this State," and the agents appointed by the same authority in 1869, to obtain a patent or patents from the Federal Government for the land so selected, are entitled to equal shares of the money, appropriated for the compensation of their services.

APPEAL from the Chancery Court of Montgomery.

Tried before the Hon. HURIOSCO AUSTILL.

The facts are stated in the opinion.

By an act of Congress of September 28th, 1850, a grant was made to Alabama, as to the other states, of the swamp lands of a certain description, within her limits, now known as the "swamp and overflowed lands;" and afterwards certain rules and regulations were established for the selection of such lands by agents of the State, and obtaining title therefor, from the United States. According to other acts of Congress, when any of said lands had been entered by, or sold to individuals after the passage of the act of 1850, and before title was conveyed to the State, the State became entitled to select and have other portions of the public domain in lieu thereof. And by operation of the second section of the act of Congress, Chapter V, approved March 12th, 1860, the right to select such swamp lands for Alabama was limited to two years from the adjournment of the next session, to be thereafter held of the legislature of the State,—a period which expired in 1863.

In February, 1860, the legislature of this State authorized and required the Governor to appoint such number of agents, not less than three, as he might deem necessary—"to select and determine, by proper proof, the swamp and overflowed lands within the limits of this State"—and report the same to the Governor, and when approved by him to communicate

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the same to the commissioner of the general land office at Washington, and obtain patents therefor to the State of Alabama. Like duties were to be performed by them, in reference to the lands to be obtained in lieu of the swamp lands that had been sold or entered.

The compensation of these agents was to be paid out of the proceeds, realized by their services, and must not exceed twenty *per cent.* of such proceeds. And the Governor was authorized to remove any of them "who shall fail to perform their respective duties, and appoint others in their places as he may think best for the State." Under this act, and for compensation as specified, (20 per cent. of proceeds,) James R. Powell, Urban L. Jones, Daniel P. Forney and S. S. Houston were in April, 1860, appointed such agents, and entered into contract as such; and in the course of that year, they selected and determined by proper proofs and surveys, largely over 400,000 acres of such swamp and overflowed lands, reported the same to the Governor, and with his aid communicated information thereof to the commissioner of the General Land Office at Washington, early in January, 1861.

According to the testimony, out of a much larger quantity reported, 400,434 acres of such swamp lands were "surveyed selected, located and 'proved up'" to the satisfaction of the commissioner, who promised to have the patents issued soon after, and to send them to the Governor, by Mr. Fitzpatrick, a senator of the State. This was not done, however. The secession of the State from the Union on the 11th of that month, and the war and other political events following thereupon, of course put a stop to further proceedings in that business.

In March, 1869, Gov. Wm. H. Smith appointed appellant, Saffold, attorney of the State to procure from the United States the patents, or a patent, to the State, of the swamp lands to which she was entitled. Saffold was then a practising lawyer residing in Washington; and by the 11th of July, 1870, he procured for the State patents for 392,719 acres of the 400,434 selected, reported and communicated by Powell and his associates.

Saffold acted as attorney only until July 2d, 1869. He testifies that then—"Governor Smith having fixed no compensation for my services, appointed myself and others, agents under said act of February 24, 1860, . . . : and commissioned me as such agent of the same date." A con-

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tract was at the same time entered into by which these persons engaged to perform the same services which that statute required of the agents authorized to be thereby appointed, and were to receive the compensation of twenty per cent. of the proceeds of the swamp lands they should as such agents acquire to the State. This was done without communication with Powell and the other agents.

Of the persons thus appointed, Saffold only rendered any service. After 1860, no other swamp lands than those reported by Powell and his associates, were ever surveyed, selected or communicated to the land office as belonging, under the act of 1850, to the State of Alabama. Only patents were obtained from the United States for the 392,719 acres, part of the quantity reported by the original agents. And all the services rendered by any other than the officers and employees of the General Government, in procuring these patents, were rendered by Saffold alone. Many other persons, though, had been concerned, or claimed to have been concerned in transacting the business relating to these swamp lands, and to be entitled to compensation.

A large quantity of these lands having been sold, Saffold, claiming twenty per cent. of the proceeds for himself, sued the State in the Chancery Court of Dallas county, and got a decree in 1874 for over \$5,400; which has never been paid. No other person was made by Saffold a party to that cause. The present suit was also brought about that time, by Powell and his associates against the State, in Montgomery Chancery Court, by virtue of a statute authorizing it, and enacting that, by publication thereof all persons claiming an interest in the fund, should be required to appear, and by petitions, propound their claims (as many did), and litigate them therein. While this suit was pending, the State by act of March 22, 1875, appropriated \$6,000, a little more than—but intended for—the twenty *per cent.* of the proceeds realized from the swamp lands, as compensation in full to all and every person entitled to any part of said twenty *per cent.*, and required all such persons within one year thereafter, “by petition or cross-bill,” to cause their respective claims to be presented in this cause, and to submit themselves to the decrees of said Court of Chancery, on the pleadings so made; and in default of so presenting and thereafter prosecuting their said claims and demands in the manner prescribed by said act, “all such persons and parties and each of them, should be forever barred of all right to receive any part or portion of said money, or to receive any per centage thereon

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from the treasury of the State; *provided* that nothing in this act shall be so construed as to alter or affect in any way, any of the legal or equitable rights of any of the claimants to said fund at the date of its approval."

And by act of February 9, 1877, "all known claimants of said fund," including Saffold, Powell, Jones, Forney, and the heirs of Houston, having propounded their claims in said suit,—the State was withdrawn therefrom as a party, and it was enacted that the "suit may progress to final decree between the complainants therein and the other claimants as defendants, petitioning creditors or complainants in cross-bill, as they may elect, and the Chancery Court may in said suit determine the legality, justice and extent of the several claims to said funds, or any part thereof, . . . provided that nothing in this act or the preceding acts on this subject shall alter or vary the legal or equitable rights of the said parties as between themselves." An appeal to this court was authorized.

The decree of the chancellor divided the fund in equal parts between Saffold, Powell, Jones, Forney, and the representatives of Houston; and from the decree Saffold took an appeal.

D. S. TROY, and BRAGG & THORINGTON, for appellant.

DAVID CLOPTON, for appellees.

MANNING, J.—We have carefully considered the able argument submitted for appellant, but can not yield our assent to its conclusions.

The claims of the parties are made under the act of Alabama of February, 1860. That provided for the selection from the public domain within this State, of the lands designated in the legislation of Congress, as "swamp lands," which were not ascertained, and were to be examined, proved and reported as such, by the agents to be appointed under that act, to the satisfaction of the land office at Washington. To the extent of 400,434 acres, this, according to the testimony, was done. Patents for this land were promised, by the Commissioner of the General Land Office, and doubtless would have been sent, but for the political events immediately succeeding. The patents afterwards issued in 1869-70, for 392,719 acres were for a portion of those same lands, without any new selection and report thereof by any agent of the State. As to those lands, Powell and his associates

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seem to have performed all that the law and contract required them to do, because it was all that could be done by them. They could do no more than prove the right of the State to the lands and demand the patents therefor, which they did do. To issue and deliver the patents, were duties of officers of the General Government, who were wholly beyond any control of the agents. We repeat that according to the evidence, Powell and his associates did all that it depended on them to do. True, that did not entitle them to the compensation stipulated for: because it was a condition of the contract that this should be paid only out of the proceeds of the lands. They agreed to make that contingent not only on their own performance of the duties they undertook, but on the performance by Government officials of their duties also. On the part of the agents themselves there was no delinquency in respect to the 400,434 acres. When, therefore, subsequently after the convulsions of the time were partially allayed, the patents for those lands were issued by the Government of the United States, to the State of Alabama, although another person was delegated to apply for and obtain them, it would not have been equitable in the State to refuse to make an allowance out of the proceeds of their sale, to the agents by whose exertions and at whose expense, the State had been enabled to obtain them. There is no mere sentiment in this view; the agents are equitably entitled to compensation.

It does not follow, though, that Saffold, also, ought not to be paid for his services. They were those, chiefly, of an attorney. He was at first appointed as such. But there being no act of the legislature specially authorizing such an appointment and no provision of law for his compensation, it seems that to obviate this difficulty, it was determined to issue to him a commission as agent under the act of February, 1860. And we suppose, that to comply with the provision that there should be at least three agents to perform the duties under that act, other persons were appointed with him,—who never performed any service, while Saffold continued to act as attorney of the State in urging at Washington the issuance of the patents. Not only were the services contemplated by the act of February, 1860, for which twenty *per cent.* commissions were to be allowed, not performed, but they could not then be performed. The time within which the State might select the swamp lands had long before elapsed, and the act of February, 1860, had thus become inoperative.

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We do not doubt that Saffold diligently rendered valuable and able professional services, by request of the Governor; that the State has been profited by them and that he well deserves a larger sum as compensation than the amount allowed him by this decree. But it does not rest with this department of the Government.

Powell and his associates claim no advantage over each other in the distribution of the fund: it was not, therefore, error to divide what was allowed to them, equally among them. We think they were entitled to all that is adjudged to them by the decree. And they do not assign error to so much of the decree as allows Saffold an equal share with them. We therefore find no reason for setting aside the decree of the chancellor, and it must be affirmed.

STONE, J., not sitting.

Yeatman v. Mattison.

Arbitration and Award.

1. *An award may be as conclusive as a judgment.*—If the submission of matters to be arbitrated was regular, and the award responds to every material question submitted, it is as conclusive between the parties as a judgment of a court, until assailed and set aside.

2. *A defendant can not defeat an action upon a note by showing that the plaintiff obtained it from the payee without consideration.*—If pending a suit an arbitration is made, and in pursuance of the award the defendant at the request of the plaintiff, executes a promissory note to a third person, he can not, when sued on the note, defeat the action by showing no consideration passed between the plaintiff and payee; nor can he raise any question as to the application of the money due on the note to payment of attorney's fees of plaintiff's counsel in the original suit.

APPEAL from the Circuit Court of Calhoun.
Tried before the Hon. W. L. WHITLOCK.

The plaintiff, Samuel Yeatman, brought suit to the fall term, 1872, of the Circuit Court of Calhoun county, against the defendant, George F. Mattison, to recover a sum of money due on a promissory note made by the defendant. To the complaint the defendant pleaded, in short, by consent, "*first*, failure of consideration; *second*, fraud; *third*, that the defendant made the note payable to the plaintiff at the request

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of W. T. Yeatman, and that no consideration for the note passed from the plaintiff to said W. T. Yeatman; and that the consideration for which the defendant made the note had failed." The plaintiff demurred to the said pleas, and the demurrer was overruled—and the plaintiff joined issue on the foregoing pleas. The defendant also pleaded for "further answer to the plaintiff's complaint, that at the commencement of this suit, the plaintiff was not the owner of the note described in the said complaint, as the plaintiff's cause of action." To this plea the plaintiff demurred, on the ground that "the plea putting in issue the ownership of the note sued upon, is not verified as required by law." The demurrer was overruled, and the plaintiff joined issue.

On the trial, the plaintiff read in evidence the note upon which the suit was brought.

The defendant then introduced as evidence the record of a suit instituted by W. T. Yeatman against Benjamin Mattison, to which the said George F. Mattison became a party as the administrator of the said Benjamin Mattison, deceased. The suit was begun to recover damages for the breach of a bond for a title to certain real estate therein described, which had been executed to W. T. Yeatman by the said Benjamin Mattison, on the 17th day of April, 1851. To the introduction of the record of this suit the plaintiff objected, but the objection was overruled, and the plaintiff excepted.

The defendant also offered in evidence an agreement for arbitration of the matters in litigation, which was as follows:

"State of Alabama, Calhoun County. W. T. Yeatman v. Benjamin Mattison. The plaintiff and defendant in this case have agreed to submit the matter in controversy to an arbitration, having selected Dr. C. S. Williams, William Harrison and A. H. Ross, as arbitrators, the plaintiff claims that some time in April, 1852, Benjamin Mattison gave him a bond for titles in the sum of one thousand dollars, conditioned to make him a good title to west half of section thirty-one, township sixteen, range eight, east, Coosa land district; he further claims that during that summer, say 1852, he paid said purchase-money and demanded titles from said Benjamin Mattison, which was refused, as east half of said half section, for which said failure the plaintiff claims the value of said quarter section of land at the market value of the same at that date, with interest thereon. G. F. Mattison, administrator of B. Mattison, deceased, claims that said W. T. Yeatman has had peaceable possession of said land to date; the defendant further claims that said W. T. Yeatman has never paid any

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money on said quarter section of land in controversy; the said land was given to Emily Yeatman and her lawful heirs by her father, Benjamin Mattison. This 18th February, 1870.

“W. T. YEATMAN,

“G. F. MATTISON,

Adm'r of Benjamin Mattison.

The execution of this instrument was properly proven. To its introduction the plaintiff objected; the objection was disallowed, and the plaintiff excepted. The defendant also offered in evidence the following award:

“The State of Alabama, Calhoun county. 18 Feb. 1870. We, the arbitrators in the above case of W. T. Yeatman v. G. F. Mattison, adm'r of the estate of Benjamin Mattison, dec'd, after hearing all the evidence and taking into consideration all the facts bearing on the case, make the following award: that said G. F. Mattison, adm'r of the estate of Benjamin Mattison, pay to said W. T. Yeatman, as damages in said case, seven hundred dollars and costs of suit. In witness whereof, we hereunto set our hands and seals, day and date above written.

“S. C. WILLIAMS, [Seal.]

“A. H. ROSS, [Seal.]

“WM. HARRISON. [Seal.]

“Filed in open court, this 5th day of April, 1870.”

To the introduction of this award, the plaintiff objected, but the objection was overruled, and the plaintiff excepted. The defendant, G. F. Mattison, testified that the note sued on was given in part satisfaction of said award. His attorney then asked him, if the said “Yeatman did not, in said arbitration, promise to dismiss the suit then pending in the Circuit Court against the witness?” To this question the plaintiff objected, the court overruled the objection and the plaintiff excepted. The witness answered that Yeatman, under the said agreement of arbitration and award, “was to dismiss the suit.” To this answer the plaintiff also excepted. The defendant's attorney asked the defendant, “if during the time of said settlement or arbitration W. T. Yeatman said anything about paying his (Yeatman's) attorneys their fees?” To this question the plaintiff objected; the objection was overruled and the plaintiff excepted.

The court, among other things, charged the jury, that if they believe from the evidence that W. T. Yeatman had refused or failed to dismiss the said suit of *W. T. Yeatman v. G. F. Mattison*, administrator, that being the condition upon which he, W. T. Yeatman, obtained said award, then they

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could not return a verdict for plaintiff in this cause." To this charge the plaintiff excepted.

M. J. TURNLEY, and CLOPTON, HERBERT & CHAMBERS, for appellant.—1. The court erred in overruling the demurrer to the four pleas. The Code requires a plea denying the ownership of such contracts when the foundation of a suit to be sworn to.—Revised Code, § 2640.

2. The record of the arbitration suit was, under the circumstances, irrelevant evidence, and should have been excluded when objected to. It did not tend to show any want of consideration; it really showed there was a consideration; so also of the arbitration and award. It is clear that the admission of the evidence of Mattison as to the agreement to dismiss the suit, was objectionable, because it contradicted the award. A judgment or award in writing can not be contradicted by the parties thereto.—33 Ala. 499; 29 Ala. 92; 1 Brick. Dig. 868, § 916.

3. The promise to dismiss and the promise to pay two hundred dollars—the giving of the note—are independent promises.—6 Ala. 699; 2 Ala. 320. The charge of the court assumed that upon parol evidence the jury were at liberty to find the note which is absolute on its face was conditional. This is an error.—21 Ala. 804–5.

JOHN T. HEFLIN, for appellee.

STONE, J.—When the award was rendered in the case of *W. T. Yeatman v. Mattison*, it settled and determined not only the matter of plaintiff's claim in that suit, but the costs incurred therein. The submission was regular, and the award responded to every material question embraced in the reference. It was, as to the matter submitted, as conclusive upon the parties, as a judgment of a court would have been, until assailed and set aside for one of the few grounds on which awards may be assailed.—See *Brewer v. Baine*, at the present term. There is nothing in this record which shows an attempt to set aside the award, or any ground for such attempt.

In the case of *Brewer v. Baine*, *supra*, we said: "It is obvious the question meeting us at the threshold of our consideration of the case, is the fact of submission and award; for if that fact is proved affirmatively, in the present state of the pleadings the award is a positive bar to the relief sought by the bill." The bill in that case, set forth no suf-

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ficient ground for setting the award aside ; and being pleaded in defence of the bill for an account and settlement of a partnership, we held it was an absolute bar.

The note sued on in the present case was given in part liquidation of the sum awarded to be due from Mattison to W. T. Yeatman. The main defence was, that Yeatman, at the time of the submission, agreed to dismiss his then pending suit, and had failed to do so. This is contradictory of the award itself, which found and adjudged that Mattison should pay the costs. Moreover, it was part of the submission that the award should be made the judgment of the court. It was equally the privilege and duty of Yeatman and Mattison to have the award made the judgment of the court ; and if such had been the case, the result would have been a judgment in favor of Yeatman and against Mattison for seven hundred dollars, the amount of the award, and the costs of suit. This proof sought to vary the terms of the submission and the award by parol proof, which is not admissible.

W. T. Yeatman had the unquestioned right to make the note payable to Samuel Yeatman, and thus pay him that sum, or even give it to him, so far as anything in this record discloses. Mattison having thus made his note payable, it does not lie in his mouth to question this disposition of his indebtedness. Nor is Mattison the proper party to move in the matter of having this fund applied to the payment of Yeatman's attorneys' fees.

There is no merit in any part of the defence attempted in this case.

Reversed and remanded.

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Lien of Landlord.

1. *A bill must show a case within the jurisdiction of a court of equity.*—A bill must necessarily disclose a case falling within the jurisdiction of a court of equity, and an error in this respect is fatal at any stage of the proceedings.

2. *A bill need not show the amount in controversy is within the jurisdiction of the court.*—A bill is not demurrable because it fails to show affirmatively that the amount in controversy is within the jurisdiction ; if it is not, the objection must be raised by plea or answer on the hearing.

3. *One partner is not liable for the acts of another beyond the scope of the partnership.*—The mere fact of partnership does not make one partner liable

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for the other with reference to matters, not shown to be within the scope of partnership.

4. *A naked bailee is not a necessary party to a bill against the bailor.*—A mere naked bailee who asserts no claim in himself to property deposited with him as warehouseman, should not be made defendant to a bill against the bailor, praying for an equitable attachment.

5. *On the death of a tenant a court of equity will enforce the lien of the landlord.*—When the death of a tenant renders it impossible to pursue the statutory remedy by attachment, a court of equity will enforce the lien of the landlord.

6. *The personal representative must be a party to a bill filed to charge personal assets.*—A bill to charge personal assets can not be maintained unless the personal representative of the decedent, in whom the legal title resides, is before the court.

APPEAL from the Chancery Court of Autauga.

Heard before the Hon. CHARLES TURNER.

Joseph L. Hall and William Lee, the husband and trustee of Louisa B. Lee, filed their bill of complaint in the Chancery Court of Autauga county, against Joseph Abraham, Isaac Abraham and William Nunn, to enforce the landlord's lien.

The complainants allege that they are the owners of a tract of land in Autauga county known as the "Hall Place," and rented the same to George Reese, for the year 1873, for one bale of cotton. The said Reese entered upon and cultivated the said premises, and produced and gathered therefrom a bale of cotton weighing less than five hundred pounds. After he had gathered and packed the bale of cotton, the said Reese, in the latter part of 1873, died. He did not deliver the said cotton to the complainants, nor did he pay them the rent due for said premises, nor any part thereof.

About the time of the death of the said Reese, one Joseph Abraham, a member of a mercantile firm composed of Joseph and Isaac Abraham, took possession of said bale of cotton, with full knowledge of the complainant's lien upon it for the rent of the land, and removed the cotton without the knowledge or consent of the complainants, and deposited it with William Nunn, a warehouseman, at Vernon, in the county of Autauga. The said Joseph Abraham had the cotton marked ("J. A."), and claiming it as his own, refused to deliver it to the complainants, although he had been frequently requested so to do.

The bill contained the usual prayer for process against the said Joseph and Isaac Abraham and William Nunn, and also prayed that the lien of the landlord might be enforced by a seizure and sale of the said cotton, and the payment of the proceeds of the sale to the complainants.

The defendants, Joseph and Isaac Abraham, in their

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answers denied the joint ownership of the complainants of the Hall Place, or that they jointly made a contract by which the premises were rented to George Reese. They denied that any rent was due, and alleged that several other bales of cotton were produced on the premises by the said lessee. They denied also that Joseph Abraham took and caused to be removed the bale of cotton from the said premises, or had it marked "(J. A.)" and deposited it with William Nunn at Vernon.

They assigned also the following grounds of demurrer, viz :

1. "There is no equity in the said bill of complaint.
2. "The said bill shows upon its face that complainants have a full and adequate remedy at law.
3. "The said bill of complaint fails to make the personal representative of George Reese a party defendant, when the allegations show that such personal representative is a necessary party.
4. "The said bill fails to show that the bale of cotton was of any value whatever.
5. "The said bill of complaint fails to show that the value of said cotton in money is sufficient to give this court jurisdiction.
6. "There is no allegation in said bill as to the quality or value of said cotton."

"The defendant, Isaac Abraham, answering separately, demurs to said bill of complaint, and assigns as causes of demurrer :

1. "The said bill of complaint shows upon its face that he is neither a necessary nor a proper party.
2. "The said bill improperly makes him a party defendant."

The answer of the defendant, Nunn, averred his ignorance of all the matters contained in the bill of complaint, except the deposit of the said bale of cotton in his warehouse. It denied that Joseph Abraham deposited the said bale of cotton, and alleged "that one Dock Davis, a freedman, deposited at his said warehouse, one bale of cotton in the month of November, 1873, and had it marked 'J. A.,' and that 'Nunn' gave a receipt to Dock Davis for the same, but that he does not know at whose instance, or under whose instructions, said bale of cotton was so deposited, and that no demand was even made of him by complainants for said bale of cotton before the filing of said bill of complaint."

The defendant, Nunn, had no claim to, or interest in, the

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bale of cotton. He demurred to the bill, and assigned the following grounds of demurrer, viz.:

1. "The said bill of complaint shows upon its face, that this defendant has no interest in the subject-matter of the suit which can render him liable to the complainants.

2. "This defendant is not a necessary or a proper party to said bill of complaint or suit."

The complainants then filed an amended bill, in which they alleged the insolvency and intestacy of the said George Reese—and that no estate was left by him subject under the law to an administrator, and that no administrator had ever been appointed. "There is no necessity for an administrator on his estate, and he left surviving him a widow, Sarah Reese, and the following named children: Milly Golson, wife of Crockett Golson, Daniel Hall and Moses, all above the age of twenty-one; and Sidney Hall, Vina Hall, April Hall, May Hall, Rose Hall and Georgia Hall, all of whom are minors. All of the children of decedent were made parties defendant.

D. B. Booth was duly appointed guardian *ad litem* for each of the named children of said Reese, and consented in writing to act as such.

On the final hearing the cause was submitted for a decree on the "bill and amended bill, and answers and demurrers contained in answers of Joseph and Isaac Abraham, and on testimony." The court overruled the demurrers, and decreed that complainants were entitled to the relief prayed for.

W. H. & W. T. NORTHINGTON, for appellants.—1. The law casts the title of the personal property of the decedent on his personal representative, and he is, therefore, an indispensable party in any litigation relative to it.—19 Ala. 666.

2. The lien of an attachment is inchoate and imperfect, until judgment is rendered against the defendant in attachment.—30 Ala. 398; 5 Ala. 503; 13 Ala. 171; 20 Ala. 538; 39 Ala. 324; 40 Ala. 410.

3. A lien created by law is dissolved by the death of the defendant and insolvency of his estate.—48 Ala. 358; 39 Ala. 324.

4. A final decree will not be pronounced unless all persons whose interests may be effected, or are to be effected by it, have been made parties.—3 Stew. & Port. 317; 2 ib. 280; 2 Ala. 209. Nor unless the decree will be a full protection to the parties litigant against future litigation in regard to the subject-matter of the suit. A decree in this case would be no protection to the defendant, Abraham, against another

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suit brought by the representative of the tenant Reese.—19 Ala. 666.

5. The complainant had a full, complete and adequate remedy at law.—*Hussey v. Peebles*, 55 Ala. 393.

DOSTER & ABNEY, for appellees.—1. The complainants having a lien for rent, and no remedy by which it could be enforced at law, filed their bill in equity and sued out an attachment under section 3416 of Revised Code.

2. The personal representative of the tenant is not a necessary party. The tenant died, leaving no property subject to administration. And courts of equity never require an unnecessary thing to be done.—47 Ala. 429.

3. It is insisted that the landlord's lien is dissolved by the death of the tenant, and the case in 48 Ala. page 358, is cited. But the distinction between liens created by law and liens created by contract, is overlooked.—39 Ala. 324; 20 Ala. 532; 13 Ala. 171; 5 Ala. 503; 3 Ala. 398. The lien is never dissolved by death or insolvency, except when it has been created by legal process.—Authorities *supra*.

4. Moreover, the proof shows that the contract in this case was a parol mortgage, which may be foreclosed in equity. *McKiethen v. D. Pratt & Co.*, 53 Ala. 116, and authorities cited. And the lien on the bale of cotton constituted a trust in the hands of Abraham.—33 Ala. 534.

BRICKELL, C. J.—A bill must necessarily disclose a case which falls within the jurisdiction of a court of equity—an error in this respect is fatal in any stage of the proceedings, and can not be cured by consent or waiver.—Story's Eq. Pl. § 10. The principle however applies to jurisdiction of the court, as to the subject matter and not to jurisdiction as dependent on the residence of the parties, or the amount in controversy. It is the rule in this State that the court will not take jurisdiction if the amount in controversy does not exceed twenty dollars; and if on the final hearing, the fact appears, the cause will be repudiated.—*Cowan v. Jones*, 27 Ala. 317. But a bill is not demurrable, if it discloses a case within the appropriate jurisdiction of the court, because it does not show affirmatively that the amount in controversy is within the jurisdiction. If it is not, it is matter of objection by plea or answer, or on the hearing.

The general rule of pleading, is, that persons having no interest in the suit, and against whom no decree can be had, are improperly made defendants.—Story's Eq. Pl. § 231.

[Abraham v. Hall.]

The bill fails to show that Isaac Abraham, or Nunn, have any interest in the bale of cotton, which is the subject of controversy, or claim any, or that they are under any liability whatever to the complainant in reference to it. Their respective demurrers should have been sustained. The only averment in reference to Isaac Abraham, is, that Joseph is his partner, and had taken possession of the cotton, stored and marked it, claiming it as his own. The mere fact of the partnership, did not render the one liable for the acts of the other, unless they were done in reference to and within the scope of the partnership business. Nunn was merely the warehouse-man with whom Joseph had stored the cotton—a mere agent or naked bailee, and should not have been joined as a defendant.

A bill to charge personal assets can not be maintained unless the personal representative in whom the legal title resides is before the court.—Story's Eq. Pl. § 170. Distributees are permitted to sue in equity, and recover personal assets, the court dispensing with the presence of the personal representative, when there are no outstanding debts against the decedent, and if the administrator was suing and recovering, his only duty would be distribution—to receive with the one hand, and pay with the other, to the persons the law appoints, and whose respective interests it ascertains. *Fretwell v. McLemore*, 52 Ala. 124. But when it is proposed to litigate the title to the personal assets, and to charge them with the payment of debts, the personal representative must be a party, and the distributees are not proper parties. The demurrer because the administrator of the tenant is not made a party should have been sustained.

The lien of a landlord on crops grown on the rented premises, for the payment of rent is an incident to the tenancy. The lien is neither a *jus in re*, nor a *jus ad rem*,—it is not property in the crops, but a right to charge them with the payment of the rent.—*Hussey v. Peebles*, 53 Ala. 432. The statute provides a remedy by attachment, for the enforcement of the lien in particular instances. There are many cases in which judicial interference for the enforcement of the lien is necessary, or it will be unavailing,—not provided for by the statute. In these cases, and in cases in which the statutory remedy is inadequate, a court of equity, in the exercise of its general jurisdiction to enforce liens, or charges, or trusts, for the payment of debts may grant appropriate relief, and may, as it would pursue any property subject to a lien, charge, or trust, follow the crops into the hands of all others

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than a *bona fide* purchaser without notice. The death of the tenant, rendered it impossible for the landlord to pursue the statutory remedy by attachment, and the court of equity has jurisdiction to intervene and enforce the lien.—*Westmoreland v. Foster*, 52 Ala. 223. No alienation by the tenant while the crop remains on the rented premises, will entitle the alienee to protection as a *bona fide* purchaser.—*Lomax v. LeGrand*, in manuscript; *Masterson v. Bentley*, in manuscript.

For the errors noticed, the decree is reversed and the cause remanded.

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Action of Assumpsit.

1. *In a suit against a corporation by an employee, it may recover damages caused by his fault.*—A railroad corporation may recover damages resulting from the negligence of an employee in the performance of his contract of service, when sued by the employee to recover his wages.

2. *A corporation may sue an employee for damages caused by his negligence.*—When damage results to cars and other property of a corporation from the negligence of an employee in the performance of his duties, it may recover damages in an action against him.

3. *The measure of damages in such a case is fixed by a legal standard.* The measure of damages in such a case is fixed by a legal standard; and the corporation having the right to maintain an action against the employee, it may when sued by him to recover wages, set off by plea such damages, and if the facts justified it, recover a judgment for the excess.

4. *The imperfect equipment of a train will not excuse negligence in an employee.*—The imperfect equipment of a train does not relieve the conductor from the exercise of due care and diligence in its management.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

This suit was brought by Edwin H. Clanton, at the February term, 1877, of the City Court of Montgomery, against the Mobile and Montgomery Railway Company, to recover wages earned by the plaintiff as a conductor of one of its freight trains.

The defendants pleaded “in short, by consent, *first*, Recoupment—the defendant having sustained damage equal to the amount claimed by plaintiff by reason of the negligence of the plaintiff as a conductor on defendant’s railroad; and *secondly*, Set-off.”

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The amount due the plaintiff was proven. The evidence also showed that during the journey of a freight train, under the charge of the plaintiff from Montgomery to Mobile, an accident had happened without any fault of the plaintiff, by which the cab attached to the rear of his train was destroyed, and the bell-rope belonging to the train was also broken and lost. This happened on the 15th day of December, 1876. On the night of the 17th of that month, the plaintiff was ordered to take his train back from Mobile to Montgomery. No cab was attached to the train, and no bell-rope was supplied by the yard-master, whose duty it was to make up the trains. The plaintiff objected to setting out with the train so imperfectly equipped, but was told unless he took the train out, another person would be employed to do so.

On the hindmost car was a hook on only one side, upon which a lantern could be hung as a signal. There should have been one on each of its sides. All the cars were closed and locked. The plaintiff had the keys to them, but was not authorized to open them except at the places to which the freight in them was to be carried. The plaintiff rode with the engineer. It was his duty to report at every telegraphic station the condition and progress of his train. At one of these stations he telegraphed that his train was "all right," although before reaching that station one of the cars had broken from the train and was resting on the track; it was left in the rear, a distance of about seven miles. After running six miles farther he discovered that the hindmost car had broken loose. The train was, at the time of this discovery, distant thirteen miles from the car. The passenger train of the defendant was known to be following his train; but there was not time for him to return to the car before the passenger train, running on schedule time, would arrive at that place.

The evidence proved that the night was dark, and where the car was left, the fog was dense; and when the smoke fell on the train, it was impossible for the engineer to see the lanterns on the rear of the train. The plaintiff did not tell the engineer who rode on the right side of the engine, that he had hung the lantern on his side, not on the last, but on next to the last car.

The testimony also showed that the passenger train ran into the box-car left by the preceding train on the track, and "damaged it to the extent of seventy-five dollars, and the pilot on the engine of the passenger train, worth one hundred dollars, was destroyed." The evidence tended to show "that

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the collision could not have been prevented by proper vigilance and skill on the part of defendant's servants in charge of the passenger train. And, also, that the yard-master in Mobile was not the proper person to whom plaintiff should have applied for a bell-rope and cab-car, but that he should have applied to Pegram, the agent, under whose directions the yard-master makes up the trains as ordered; and, also, that between the place where said car was dropped and where plaintiff discovered it was left, there were four curves sufficient to enable one sitting in the engineer's or fireman's seat to have seen the lights attached to the hindmost car by looking back, and even when the road was straight, such lights could be seen by leaning over and looking back, except when the smoke came down on the train."

Among other matters, the court gave the following charges, to each of which the defendant severally and separately excepted.

"That the Mobile and Montgomery Railway Company is bound to furnish and maintain suitable instrumentalities for the discharge of the duties it requires of its employees, and if the jury believe from the evidence that the company did not properly equip the train on which the accident happened, on the 17th of December, the defendant can not recoup, and the jury must find for the plaintiff.

"If the jury believe from the evidence that the yard-master at Mobile was the agent of the defendant, and was acting of Mr. Pegram, agent of the defendant at Mobile, and acted as such agent in making up the trains, and that the plaintiff notified the yard-master that the train was imperfectly equipped, then such notice was notice to the defendant, and the plaintiff was not liable for the damage that occurred in consequence, but is entitled to recover.

"That if defendant sustained damages by reason of the negligence of the plaintiff while in defendant's employment, defendant might recoup to the extent of its entire claim, but that damages resulting to defendant by plaintiff's negligence, could not be the subject of a set-off."

CLOPTON, HERBERT & CHAMBERS, for appellant.—1. The defendant can recoup from the plaintiff's wages the damages sustained by the negligent performance of the plaintiff's duties as conductor.—Waterman on Set-off, §§ 474-5, 469, 483; 13 Ala. 586; 34 Ala. 201.

2. An important question in this case was, whether the plea of set-off was a proper defence. This was raised by the

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last charge of the court. According to the evidence, the injury done appellant's property was in money value more than the appellee's wages. We claim that under the Code the damage done in this case allowable under the plea of set-off.—Code, § 2642; 52 Ala. 525-6.

SANFORD & MOSES, for appellee.—1. The appellant is bound to furnish and maintain suitable instrumentalities for the work or duty which it requires of its employees, and it is "liable for any damages flowing from such neglect of duty."—76 Penn. St. Rep. 389; S. C. 18 Am. Rep. 412-15; 3 P. Smith's Reps. 453; 2 Wright, 104. Since this is true, it follows that it can not recoup "damages flowing from such neglect of duty in an action brought by its employee for wages due from the company.

2. It is conceded that no neglect of duty on the part of the railway company would justify negligence on the part of the employee. But no negligence of the appellee was proven. The fault of the company in failing to equip the train, rendered the care and diligence of the plaintiff unavailing.

3. It is not denied, that from the wages of the plaintiff the amount of damages sustained by the company by reason of the negligence of the plaintiff, could have been recouped from his wages. A charge to this effect was given by the court. There was no evidence that the plaintiff was indebted to the defendant on any contract whatever. All charges must be construed in reference to the facts of the record. The application of this rule will show the court did not err in its charges.

MANNING, J.—Appellee, Clanton, who was plaintiff in the City Court, was conductor of freight trains on the railroad of appellant. The cab-car, or caboose, at the end of a train under his charge, got damaged, without his fault, on its passage to Mobile. The cord also was broken by which communication was maintained between it and the engine at the front. And when a train was made up for him, for the return trip, to come up at night, he was not furnished according to his request, with a cord that should connect the rear car with the locomotive, and was obliged to take a place with the engineer in the locomotive at the head of the train. One of the hooks, also, by which lamps with red lights are fixed to the two sides at the rear end of the hindmost car, that it may among other reasons, be seen from the engine in front whether the train is complete or not, was broken off.

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Plaintiff, therefore, attached but one lamp to that car, and hung the other on the hook upon the side of the next car before the last one, and on the opposite side of the train. This was the same side which the engineer occupied in the locomotive, while Clanton sat on the other side, where only the light on the hindmost car could be seen from the locomotive. He did not inform the engineer that the light which the latter could see, was not on the hindmost car, but on the next in front of it. And the engineer was thus justified in considering the train complete as long as he could see that light. It was a duty of the conductor as well as the engineer, to look well to his train, and keep it together.

On the way up, this hindmost car loaded with freight and locked, got detached from the train, which proceeded thirteen or fourteen miles further before this fact was discovered. Behind it, as Clanton knew, a fast passenger train was coming up from Mobile. And his train stopped five minutes at a station seven miles distant from the place at which the detached car was left upon the track; and while there, it being his duty to report by telegraph from that point for the train following him, the condition of his train, he dispatched back a message that it was all right.

A short time afterwards, the upward bound passenger train without any fault of its engineer or conductor, ran into the detached car, damaged it to an amount of nearly two hundred dollars, and broke off the pilot to the engine of that train, causing a still further loss.

Clanton asked of the yard-master in Mobile, whose business it was to make up the freight trains, for a cord, which was not furnished him. He was told that he must apply for it in Montgomery, and that if he declined to conduct the freight train up, another conductor would be directed to do so: and he came with it, to avoid losing his place. There was some evidence that the application for a cord was not made to the right person.

Having been discharged by the company, Clanton sued it for his wages in arrear, and by pleas of set-off, and recoupment, the defendant insisted that he should be charged with the loss it had sustained by the collision which was produced, it is contended, by his negligence.

The court, among other charges to the jury, gave the following, which was excepted to on the part of the company: "The Mobile and Montgomery Railway Company is bound to furnish and maintain suitable instrumentalities for the discharge of the duties it requires of its employees: and if

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the jury believe from the evidence that the company did not properly equip the train on which the accident happened on the 17th of December, the defendant can not recoup, and the jury must find for the plaintiff."

The fault of this charge is that it relieves the plaintiff of responsibility for all the consequences of his own negligence, as an employee of the company, if he was guilty of any, on this occasion. The law is justly very strict in requiring railroad companies, in behalf of their customers and the public who depend upon them for transportation of persons and property, to be provided to the utmost of their power, with the means of safely performing their duties as carriers. Among the most important of the instrumentalities to this end, are faithful, competent and vigilant employees. More accidents are probably occasioned by their inattention, than in any other manner. Now and then, when a great disaster with the loss of many lives, is caused by the carelessness or recklessness of a railroad engineer or conductor, the public become, perhaps, unreasonably furious, and clamor to have him hanged. But except on such occasions, they are apt to forget that negligence on the part of such agents, while running railroad trains, is almost always but little less than a crime. A score or more of persons might probably have been killed or maimed by the collision in question, if it had happened at a place a hundred or two yards from that at which it occurred: and a loss of thousands of dollars, instead of hundreds, might have been thereby cast upon the company. Is it not evident, then, that if this collision was caused by a plain neglect of duty on the part of the conductor, and could have been avoided by a due degree of watchfulness, that it was manifest error to say that because the train was not perfectly equipped, he is not responsible?

Moreover the charge in question ignores the well established difference between the liability of a railroad company to its employers and its liability to its employees,—its responsibility to its customers the public, and that to the persons in its service. As we said in the *Mo. & Montg. R. R. Co. v. Smith*, (in manuscript) the former pay the company to perform services for them; the latter are paid by the company to perform work for it. Their skill and diligence are bargained for, because needed for the purpose of making repairs, completing equipment and preventing accidents, to the end of enabling the company safely and efficiently to fulfil its engagements. And they are paid according to the character and exactions of the service. Generally, also, there

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must be co-operation with them on the part of other employees of the company in the work to be performed. Wherefore it has often been ruled that as between their employers and themselves, employees assume the ordinary risks and perils of the service, including those arising from the negligence of their fellows in the same work.

Whether, however, the fault of not having the freight train, on this occasion, fully equipped, be chargeable upon the company or its servant, the yard-master of Mobile, is a matter of no consequence here. If it was the fault of either, and that was the cause of the collision and damage complained of, and these are not attributable to the negligence of Clanton, he is not liable for the loss occasioned thereby; but if they are attributable to his negligence, he is liable.

It may often happen, by accident or otherwise, that a company's railroad, or trains on it are out of order and can not immediately be perfectly equipped,—while at the same time it has duties to perform as a carrier which can not well be delayed until everything is in perfect order. The consequences of delay may be more serious than the probable consequences of sending a train forward without being completely equipped. There may, indeed, be very little risk in doing the latter under careful management. And unquestionably, a conductor who, knowing the deficiencies, undertakes to carry such a train through, is bound to use all the diligence and watchfulness that are reasonably necessary to do so successfully. And it follows that he is responsible for the damages that may happen by reason of his negligence. His vigilance should be proportioned to the importance and delicacy of the task assumed.

We have referred to some of the facts in this case and the possible deductions from them, only in explanation of the law on the subject. It must not be inferred that we are of the opinion that the accident complained of was caused by the fault of Clanton. Whether it was or not, is a question to be answered only by a jury. It seems to be admitted that he was in no way responsible for the uncoupling of the hindmost car. And, perhaps, he was not to be blamed for not having found out that it was uncoupled in time to prevent the accident that followed. There was evidence that the night was foggy, and that the smoke of the locomotive hung low, and, perhaps, sometimes, prevented the lamps from being seen. It is a case for a fair and just inquiry by the jury whether the damage produced by the accident is to be ascribed to Clanton's negligence or not. But the jury should be informed

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that if it is chargeable on him, he is not to be exonerated from liability, merely because when he undertook the service, there were deficiencies which were not concealed from him, in the equipment of the train; but not such as should have prevented a conductor, who was duly careful, from carrying it safely through.

If the jury should find Clanton chargeable with the damages, there is no doubt that the company may be allowed to recoup them against his wages.

In respect to set-off, the law now is that "mutual debts, liquidated or unliquidated demands *not sounding in damages merely*, subsisting between the parties at the time of suit brought, may be set off one against the other."—Code of 1876, § 2991. Whenever the defendant can maintain a cross action at law because of matters arising out of the plaintiff's breach of the contract sued on, and the damages recoverable are fixed by a legal standard, such damages may be insisted on as a set-off in an action upon the contract.—*Eads v. Murphy*, 52 Ala. 526, and cases cited. If Clanton is liable for anything in this case, it is, for not performing, with due vigilance and diligence, his contract to serve as conductor. And if the loss resulting from such negligence consists only of the damage done to cars or other property, the amount of which depends upon the expense of making them good by repairs, or of putting the defendant in these particulars in as good a condition as it was in before,—such damages may be considered as "fixed by a legal standard." The computation is founded on the ascertainable values of material things, as it would be in an action of assumpsit concerning the same values.

And where such damages are set off by a defendant and exceed the amount of plaintiff's claim, according to section 2992 of the Code of 1876, a verdict and judgment for the excess may be rendered upon a proper plea of set-off in favor of the defendant.

Let the judgment of the Circuit Court be reversed and the cause remanded.

[Jenkins v. Bradford.]

Jenkins et al. v. Bradford,*Partition of Lands.*

1. A contract in which it is agreed that attorneys-at-law shall receive one-half of the land in litigation, for the services they may render in the suit, if it should be conducted to a successful termination is champertous ; and being against public policy is void.

APPEAL from the Chancery Court of Clay.

Heard before the Hon. NEIL S. GRAHAM.

Taul Bradford, James B. Martin and W. H. Isbell formed a partnership for the practice of law, under the name and style of Bradford, Martin & Isbell. They were employed as lawyers by one William H. Jenkins to defend him, indicted for murder in the Circuit Court of Clay county, in this State. For the payment of the fee agreed upon by the parties, Jenkins made a promissory note on the 29th of December, 1868, payable to the said firm twelve months after date ; and to secure the payment of the note at maturity, Jenkins executed a mortgage on land therein described.

On the 5th day of January, 1869, Jenkins employed Bradford, Martin & Isbell to file a bill of complaint against one M. H. Porter, for the purpose of enjoining and restraining him from foreclosing a mortgage on land, that had been executed by Jenkins to Porter. To compensate them for services to be rendered in this suit, if it should be conducted by them to a successful termination, Jenkins agreed to give them one-half of his interest in the land covered by the mortgage to Porter. At that time Jenkins had no deed of conveyance of the land so mortgaged ; but he held a bond for titles executed by W. P. Chilton. On the back of the bond he made this endorsement :

“ For value received I hereby transfer, assign and convey to Bradford, Martin & Isbell an undivided one-half interest in the lands mentioned in this bond, and direct William P. Chilton to make titles to them to said lands.

“ W. H. JENKINS.

“ January 5, 1869.”

Both the criminal and civil suits were so successfully defended and prosecuted by Bradford & Martin (Isbell having withdrawn from the firm) that Jenkins was acquitted of the

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charge of murder, and Porter was perpetually enjoined from foreclosing the mortgage. This decree was affirmed by the Supreme Court.

Jenkins delivered the land to Bradford, who held peaceable possession of it for the said partnership, and afterwards for himself, for some time. Afterwards Bradford, hearing that Jenkins had put a construction upon the agreement made on the fifth day of January, 1869, which differed from his own, drew up an explanatory agreement between Jenkins and Bradford & Martin (Isbell having withdrawn and surrendered his interest in the matter to the firm), which substantially embodied the contract already mentioned. This was signed on the third day of June, 1870.

Jenkins, and John T. Morgan, as the trustee of W. P. Chilton, on the 19th day of November, 1851, entered into an instrument of writing by which Morgan was empowered to sell the land for which the bond for titles had been given, and out of the proceeds to pay the notes made for the purchase-money. Subsequently Jenkins paid for the said lands and John T. Morgan and his wife, Cornelia G. Morgan, executed a quit-claim deed of the lands to Taul Bradford and William H. Jenkins on the 24th day of January, 1873. The said Chilton, before the date of this deed, had conveyed all his interest in the land to Morgan.

From the purchase of the interest in the said land by Bradford, Martin & Isbell, the said Jenkins continued to reside on the premises, and to cultivate as much of the cleared land as he desired, but he paid Bradford rent on a part of the land only for one year. A short time before Bradford filed his bill of complaint in the Chancery Court of Clay county; Jenkins disputed the right of Bradford to the said land, "interfered with the quiet enjoyment of his interest therein, and refused to allow him any proportion of the last year's rent for the land." He "cut down, unnecessarily, a large quantity of green timber on portions of said land, and threatened to clear other portions of it, to the great injury of the premises."

The firm of Bradford, Martin & Isbell has been dissolved during the litigation of Jenkins with Porter; and after its termination the firm of Bradford & Martin was also dissolved. Both Isbell and Martin relinquished to Bradford all of their right and interest in the fees evidenced by the contract, note and mortgage above described. The mortgage executed on the 29th day of December, 1868, by Jenkins to Bradford, Martin & Isbell, em-

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braced also that part of his property which was transferred to the said firm by the agreement dated January 5th, 1869.

On the 8th day of February, 1873, Taul Bradford filed a bill of complaint in the Chancery Court of Clay county against William H. Jenkins and Mrs. Elvira Chilton—the widow of the said William P. Chilton. The complainant prayed that the land which was ordered to be conveyed to the firm of Bradford, Martin & Isbell by the agreement of January 5th, 1869, should be sold, and that a title should be made to the purchaser; that an account should be stated between Jenkins and Bradford, and that after the allowance to Bradford of what was justly due to him, the proceeds should be divided between Jenkins and himself. He prayed, also, that Jenkins might be enjoined from the commission of waste, and that “a receiver might be appointed to take charge of and superintend the premises, and to receive the rents, incomes and profits thereof, until the final hearing of the cause.”

Subsequently, Taul Bradford filed and amended bill of complaint against the same defendants, and sought thereby also to foreclose the mortgage given to secure the payment of the note dated the 29th day of December, 1868. In the amended bill the complainant prayed that the said promissory note might be decreed to be paid out of the proceeds only arising from the sale of the half-interest owned by Jenkins in the land described in the bond for titles, and which subsequently was conveyed by Morgan to Bradford and Jenkins. Jenkins alleged, in his answer, that the mill tract of land embraced in the mortgage was sold, with the knowledge and consent of Bradford, to Arch. Carter, from whom Jenkins had previously purchased it.

A writ of injunction, restraining Jenkins from the commission of waste, &c., was granted. And on the final hearing of the case, the court “adjudged that the complainant” was “entitled to the relief he” prayed “for in his bill of complaint as amended.”

JOHN T. HEFLIN, for appellant.

WALDEN & BISHOP, for appellee.

STONE, J.—The extreme views, sought to be established in defence of this suit, are not sustained by the weight of the evidence. But, independently of that question, on a principle of public policy which has long been an inexorable

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rule of law, the bill in this case must fail, so far as it seeks partition, and a recovery of one-half the lands. That feature of the case comes directly within the rule against champerty.—*Holloway v. Lowe*, 7 Por. 488; *Dumas v. Smith*, 17 Ala. 305; *Byrd v. Odem*, 9 Ala. 755; *Wheeler v. Pounds*, 24 Ala. 472. And what is called the renewed, or explanatory contract, must likewise fall.—*Lecott v. Sallee*, 3 Por. 115; *Dickinson v. Bradford*, at the present term.

The bill as amended contains equity, so far as it avers, and seeks to foreclose the mortgage made to secure the note for five hundred dollars. The defence admits the justness of that claim. The condition of the record, however, renders it improper that we should here pronounce a decree of foreclosure. The answer of Jenkins sets up that, with the knowledge and consent of Bradford, he, Jenkins, had sold the mill tract to Carter. The mortgage to Bradford conveys the mill tract as well as Jenkins' home tract. Unless the bill is so amended as to abandon claims to the mill tract, its claimant should be made a party defendant.

Reversed and remanded at cost of appellee.

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Practice.

1. *The consideration of a question by the court may be waived by the parties.* The appellate court will not consider a question which the record shows has been waived by an agreement of the parties.

2. *The mortgagee is a necessary party to a bill filed by the transferee of a mortgage debt.*—A bill filed by the transferee of a mortgage debt to whom the mortgage has not been assigned, to foreclose the mortgage, must make the mortgagee a party to the suit.

3. *The omission of an indispensable party is available on error.*—The omission of an indispensable party is available on error, although no objection was made on this account in the court of chancery.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

Thomas R. Hawley, a resident citizen of the State of New York, filed a bill of complaint in the Chancery Court of Montgomery county, against J. DuBose Bibb, to foreclose a mortgage executed by Bibb and E. G. Bibb, his wife, to E. H. Morrison & Co. The mortgage was made to secure a bill

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of exchange for five thousand three hundred and twenty dollars, dated on the 23d of November, 1872, and payable on the first day of June, 1873, to E. H. Morrison & Co. The bill of exchange was signed by J. Dubose Bibb alone, and before maturity, it was transferred to the complainant for a valuable consideration.

The bill prayed that the said Bibb might be made a party defendant to the bill of complaint, and that an account might be taken of the amount of money due the complainant upon the said bill of exchange, and that the lands mentioned and conveyed in said mortgage may be sold under the order and decree of the court to pay and satisfy the debt due the complainant.

The defendant in his answer, among other things, alleged that he entered into an agreement with E. H. Morrison & Co. by which he "drew and accepted said bill of exchange, and delivered the same to said E. H. Morrison & Co., and in consideration thereof the said Morrison & Co. agreed to purchase for future delivery one thousand bales of cotton, as the respondent might direct, in the city of New York, and keep up the margin thereon for respondent as might be required, until the first day of June, 1873, or, in other words, purchase for respondent said 1,000 bales of cotton for any months between the 23d day of November, 1872, and the first day of June, 1873, keeping up his margin on the same, and respondent also agreed to make good to said E. H. Morrison & Co., at settlement of the same, any amount it might be necessary for the said Morrison & Co. to deposit for the account of respondent as loss on the said purchases over and above the said bill of exchange; that the real and substantial agreement as made and understood between the parties thereto, was that the cotton so to be purchased for respondent was not in fact to be delivered as contracted for, nor in fact delivered at all, but that the difference in the price of cotton at the time of said purchase, and at the time contracted to be delivered, should be paid by one party to the other as the cotton should rise and fall in the market, and that the same in reality was a wager that cotton would rise in value over the price at which the same was pretended to be bought by the purchaser, and that it would fall on the part of the seller; that it was the positive understanding no cotton was to be actually bought and none delivered, but the said E. H. Morrison should, for account of respondent, enter into a contract of purchase of cotton as aforesaid, and that said Morrison should keep up the margin thereon," &c.

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The answer of the defendant also stated the manner in which the said contract was executed. But as the record shows that an agreement was made between the parties to this suit, "that the legality of the contracts for the purchase of cotton" should not be "raised in the Supreme Court," it is unnecessary to set out the allegations.

On the final hearing, the court decreed that the complainant was entitled to relief, and directed the register to advertise and sell the land described in the pleadings, and from the proceeds, to pay the amount due the complainant.

R. M. WILLIAMSON, for appellant.

ELMORE & GUNTER, for appellee.

BRICKELL, C. J.—The argument of appellant's counsel, is devoted mainly to a discussion of the legality of the contract made by appellant with Morrison & Co. A consideration of that question, on examining the record, we find the parties have by agreement waived, and there would be a manifest impropriety in the expression of any opinion in reference to it.

The remaining ground of error insisted on, the failure to make the mortgagee in whom the legal title resides, a party is however fatal to the decree. The uniform course of decision in this court, is, that to a bill for foreclosure, by the transferee of a mortgage debt, the mortgage not having been assigned to him, so as to pass the legal estate, the mortgagee is an indispensable party.—*Prout v. Hoge*, 57 Ala. 28. The omission of an indispensable party, is available on error, though objection was not made in the court of chancery. *McMaken v. McMaken*, 18 Ala. 576; *Woodward v. Wood*, 19 Ala. 213.

The decree must be reversed and the cause remanded.

STONE, J., not sitting.

[Graves v. Shulman, Goetter & Weil.]

Graves v. Shulman, Goetter & Weil.*Statute of Frauds.*

1. *The promise, for a consideration, to pay the debt of another is not within the Statute of Frauds.*—A promise of one person to pay the debt of another, made upon a new and valuable consideration beneficial to the promissor, is not within the Statute of Frauds.

2. *A promissory note is not conclusive presumption that the payee has paid the maker.*—Although the giving of a note is *prima facie* evidence that a previous indebtedness of the payee to the maker is or has been extinguished, yet the contrary may be shown by proof.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

At the spring term, 1875, of the Circuit Court of Montgomery county, Louis Shulman, Louis Goetter and David Weil, partners under the firm name and style of Shulman, Goetter & Weil, filed against W. D. Graves the following complaint:

“The plaintiffs claim of the defendant one hundred and seventy 85-100 dollars, due by promissory note made by him on the 27th day of November, 1873, and payable on the 28th day of November, 1873, with interest thereon, payable at the office of the plaintiffs at their office in Montgomery, Alabama.”

The plea and demurrer to the plea, and other facts, sufficiently appear in the opinion.

R. M. WILLIAMSON, and ARRINGTON & GRAHAM, and FITZPATRICK & RUGELEY, for appellants.—The pleas to which the appellees demurred set out a contract by which the appellees promised, upon a consideration, to pay the appellant certain money due the appellant from one Mead. The consideration of the promise was beneficial to the appellees. Such an agreement is not within the Statute of Frauds.—20 Ala. 109; 21 Ala. 720; 37 Ala. 32; 30 Ala. 597; 2 Brick. Dig. p. 31, § 234. •

SAYRE & GRAVES, for appellees.

MANNING, J.—The plea in effect alleges that one Mead being indebted to defendant by a note made by him and

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another, which had become the property of defendant, and being willing and about to secure the payment thereof by a mortgage to him of some property, appellees, the plaintiffs in the Circuit Court, to whom also said Mead was then indebted, and of whom he proposed to purchase other goods during the current year, agreed with said Mead and defendant, that in consideration that Mead would and did execute a mortgage of the same and other property to plaintiffs, to secure payment to them of the debt so due and to be contracted, and also of the amount of his debt to defendant, they, the plaintiffs would pay, as they did, in cash, to defendant, three hundred dollars of the debt of Mead to him, and would pay the residue thereof, the next fall afterwards, to defendant; but that, although in pursuance of the agreement, the debt of Mead to defendant was discharged and extinguished, plaintiffs did not and would not pay the said residue of said debt to defendant, but were now on account thereof indebted to him \$236 12-100, besides interest; which indebtedness they offered to set-off against the debt sued for.

To this plea a demurrer was sustained; and the main question presented for our decision, is, whether or not under the statute of frauds the contract set up in the plea, was not void as an agreement, not in writing to pay the debt of another person.

It has been frequently decided in this State, that the promise of one to pay the debt of another, made upon a new and valuable consideration beneficial to the promissor, is not within the statute of frauds.—See some of the cases referred to in *Mason v. Hall*, 30 Ala. 601, and *Ragland v. Wynne*, 37 id. 32.

The other ground of demurrer, that the agreement described in the plea was of an older date than was the note which is sued on—and could not, therefore, be set up against the note, is not well taken. Although the giving of a note is often *prima facie* evidence that a previous indebtedness of the payee to the maker has been, or is discharged, it is allowable to allege and show in any particular case, that in such case, this is not true. And in the plea under consideration, it is alleged that the prior indebtedness of plaintiffs to defendant set up in the plea of set-off was not in fact discharged.

Let the judgment be reversed and the cause remanded.

[Keith v. Cliatt and Brother.]

Keith v. Cliatt and Brother.*Practice.*

1. *It may be presumed from the recitals of a judgment entry that the parties were in court.*—Although the transcript contains neither summons, complaint nor plea, yet if the judgment entry recites that the parties came by attorneys; that issues joined were submitted to a jury; that they returned a verdict upon which a judgment was pronounced, it must be held that the parties were in court by proper service, or voluntary appearance; that a complaint containing a substantial cause of action was filed, and that issues were joined thereon.

2. *An amendment will not be presumed, because leave to amend was granted.* In the absence of anything of record to show that an amendment was made, it can not be presumed that it was made, from the mere fact that leave was given to amend.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

The facts are contained in the opinion.

TAUL BRADFORD, for appellant.

— PARSONS, for appellees.

STONE, J.—The present record comes before us in a very imperfect state. There is neither summons, complaint or plea. Still, the judgment entry recites that the parties came by attorneys, that issues were joined which were submitted to a jury, that the jury returned a verdict, upon which the judgment of the court was pronounced. On this recital we are bound to presume that both parties were in court by proper service, or voluntary appearance, that a complaint containing a substantial cause of action was filed, and that issues were formed thereon. The record affirms all this, and the record imports absolute verity.—See *Deslonde v. Darlington*, 29 Ala. 92; 1 Brick. Dig. 782, §§ 133, 127.

The *supersedeas* bond also recites that such judgment was rendered.

The judgment entry recites that plaintiff had leave to amend his complaint; but we can not learn that such amendment was made, or if made, in what it consisted. The judgment rendered is in favor of H. J. and B. F. Cliatt;

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and the *supersedeas* bond is payable to them, and recites a judgment rendered in their favor.

Judgment of the Circuit Court affirmed.

Bowden v. Perdue.

Bill to Correct the Errors of a Court of Probate.

1. *Irregularities in judicial proceedings will not authorize the interference of courts of equity.*—Irregularities in judicial proceedings, or the errors of courts of competent jurisdiction, can not create an equity which will justify the interference of a court of equity.

2. *The wrong must occur without fault of the complainant.*—The court may be satisfied that injustice has been done, but the unvarying condition precedent to its interference, is the clear demonstration that the wrong occurred without *fault or negligence* of the complainant.

3. *The want of diligence destroys the claim to equitable relief.*—The want of diligence, on the part of the complainant, is as fatal to any claim for equitable relief under the statute as under the rule, defining the original jurisdiction of a court of equity.

4. *Errors in judicial proceedings must be corrected by an appeal.*—A party who has had his day in court, has fully presented his evidence, and on it the court has pronounced judgment, if error intervene, must correct it on appeal.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. HURIOSCO AUSTILL.

Lillie M. Bowden, an infant, filed by her next friend, Jesse Bowden, a bill of complaint in the Chancery Court of Butler county, to correct the errors committed by the Court of Probate of the said county, in the settlement of her guardian.

The bill alleges that Lillie M. Bowden is the daughter of Bennett Bowden, who is dead; and that she inherited from her father both real and personal property.

The Probate Court of Butler county, about the first day of January, 1865, appointed W. B. Bowden her guardian, who acted as such till August 5th, 1869, when he resigned, and made a final settlement of his guardianship. Afterwards one James H. Perdue, who was the sheriff of the said county, "was, as such sheriff, duly appointed guardian of the complainant on or about August 5th, 1869; and, accepting the trust, he received from W. B. Bowden, her former guardian, about the sum of six hundred and fifty dollars, and also two hundred and eighty acres of land, lying in Butler county." On the 27th day of February, 1871, said Perdue made an annual settlement of his guardianship. It was ascer-

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tained that he had in his possession six hundred and sixty-six dollars belonging to the complainant. On the same day he lent to one J. M. Sutherlin, then engaged in business as a banker in the city of Greenville, the said sum, without any security, as appears from the following certificate of deposit:

"Greenville, Ala., February 17th, 1871. Received from J. H. Perdue, Esq., guardian of Lilly Bowden, six hundred and sixty-six 1-100 dollars, subject to his order, upon return of this certificate, bearing interest from date at the rate of eight per cent. per annum."

The said Perdue, on the 22d day of November, 1871, collected one hundred and eighty 50-100 dollars, as rent for her said land, and on the same day lent it to J. M. Sutherlin & Co., bankers in the city of Greenville, and received a certificate of deposit similar to that already mentioned. For the payment of these loans he neither required nor took any security.

In the early part of the year 1872, J. M. Sutherlin & Co. were adjudged bankrupts, and on an annual settlement made by Perdue, as guardian, on the 4th day of June, 1873, he was allowed a credit of eight hundred and forty-six 51-100 dollars, the amount of the said certificate of deposit.

On this settlement the complainant was represented by a guardian *ad litem*, duly appointed by the Court of Probate. He objected to the allowance of the credit, but his objection was overruled by the court.

The said Perdue continued to act as guardian of the complainant till January 1st, 1874, when he resigned. He made a final settlement of his guardianship on the 27th day of the following March. At that time the complainant was represented by a guardian *ad litem* "who moved said Probate Court to correct said annual settlement of June 4th, 1873, by striking therefrom the credit of eight hundred and forty-six 51-100 dollars, and charging said Perdue with interest on the said sum from the dates of each of said certificates." Evidence was introduced tending to show the negligence of the said Perdue; but "the court overruled the motion and refused to correct the said account, or to charge said Perdue with the said sum and interest thereon."

The bill alleged that the complainant was of tender years, resided in Memphis, in the State of Tennessee, "and having no one to represent her interest except the *guardian ad litem*, she was unable to take an appeal to the Supreme Court from the decree rendered on said settlement."

The bill prayed that on the final hearing, "the court would

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set aside the allowance of the credit by the Court of Probate as erroneous, and would render a decree charging the said Perdue with the said amount with interest thereon, and that the said account on the final settlement be restated," &c.

The defendant, James H. Perdue, demurred to the bill of complaint on the following, among other grounds, viz :

"That it appears from said bill of complaint, the complainant is not entitled to the relief prayed for against this defendant, and that said complainant is not without fault or neglect in the settlement made before the Probate Court of Butler county, Alabama, and which she now seeks to revise."

On the final hearing, the court sustained the foregoing ground of demurrer, and overruled the other causes of demurrer assigned by defendant, and dismissed the bill of complaint.

HERBERT & BUELL, for appellant.—1. Appellant is entitled to relief under Revised Code, §§ 2451, 2274. The sole question in this case is whether or not the failure to appeal from the decree of the Probate Court within the time prescribed by law is such a failure or neglect as will bar the appellant from her remedy under the statute.

2. The remedy being strictly one of statutory creation, effect must be given to the intention of the legislators as far as possible, without violence to the language of the statutes. The legislature provided two remedies for the correction of errors in the Probate Court: the broad remedy of appeal to the Supreme Court, open to all; and that of a bill in chancery, restricted to him who can complain without fault or neglect.

3. If the operation of the statute should be limited by the law of appeals to the six months allowed in section 2244 of the Revised Code, it would be a good ground of demurrer that the complainant had an adequate remedy at law by appeal. The effect of which would be to divest chancery entirely of the power conferred by the statute. The injured party could not go into chancery within six months because of the remedy by appeal; nor after six months because of his failure to appeal.

4. The statute extends the powers of the courts of chancery. It had an inherent original jurisdiction of fraud, and the correction of mistakes of fact. It could take no cognizance of errors of law. But this statute gives this power in certain cases. Errors of law must always appear on the record, and it is presumed parties to a cause know the

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law, and hence is to be informed of the error. Then, knowing the law and the error of the court, they must also know their right to appeal. If failure to appeal operates as a bar, then courts of chancery can take no cognizance of errors of law, and the statute is nugatory.

5. The language of the statute is simple, and clearly indicates that "the fault or neglect of the party injured," must have caused or contributed to the error of law or fact in order to bar him of the remedy provided therein. The fault or neglect must have occurred before his right of appeal accrued, and not afterwards. And hence failure to appeal can not be such fault or neglect. In this case no such fault or neglect of the appellant is shown. She appeared at the hearing of the cause by guardian *ad litem*, and contested the allowance of the credits in controversy. The attention of the court was called to the error at the time, and was caused by no fault of appellant, nor contributed to by her negligence.

GAMBLE & BOLLING, for appellees.—1. The bill shows the matters alleged in it were fully investigated in the Probate Court, and there is no averment in the bill of special circumstances which prevented the appellant from urging the matters relied on for relief, or of appealing from the decree of the Probate Court; nor is there any averment of fraud on the part of Perdue, or of accident, or mistake by the appellant, or those representing her, prejudicial to her rights in any way; nor that there has been newly discovered evidence. Without some of these allegations and facts we insist the court of equity is not authorized to interfere to grant relief.

2. The jurisdiction of the Court of Probate having rightfully attached, its decree on final settlement is of equal dignity and conclusiveness as to parties and privies as the judgments or decrees of any other court of law or equity. *Waring v. Lewis*, 53 Ala. 615, and authorities cited—and this case decides the one now before the court.

BRICKELL, C. J.—The bill is filed for the correction of errors committed by the Court of Probate, on the final settlement of a guardianship. It is not averred that by accident, mistake, surprise, or fraud, or by any act of the guardian, the ward, now complaining, could not have had in the Court of Probate, the full benefit of every fact now relied on as a ground of equitable interference. On the contrary, it is averred these facts were introduced in evidence, and the

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court exercising its proper jurisdiction, adjudged they were insufficient to charge the guardian for moneys he had loaned without taking security for their repayment, which were eventually lost. It is apparent the court erred, and it is to be regretted that any court should have fallen into such gross error, working such grievous injury. Irregularities in judicial proceedings, or the errors of courts of competent jurisdiction, can not create an equity, which will justify the interference of a court of equity.—High on Inj. § 130. Judgments at law, sentences of courts of exclusive jurisdiction, or decrees of courts of jurisdiction concurrent with that of a court of equity, are of the same finality and conclusiveness in equity, as at law. Injustice may have been done—the court may have misconceived or misapplied the law—the jury may have erred in judging, or disregarded the facts, a court of equity can not intervene merely to revise and correct the error. In *Duckworth v. Duckworth*, 35 Ala. 73, it was said, relief being sought in equity, against a decree of the Court of Probate: “No rule is better established, than that a court of chancery will not relieve in regard to a matter as to which the complainant could have had redress in a previous litigation, unless he was prevented from obtaining it, by accident, fraud, or the act of the opposite party, *unmixed with fault or negligence on his part.*” In *Watts v. Gayle*, 20 Ala. 825, it was said by GOLDTHWAITE, J.: “The rule allowing parties to appeal to chancery against a judgment in another court is of great strictness and inflexibility, and it is necessary that it should be so, as otherwise the jurisdiction of that court would supplant that of the other tribunals.” There is no part of its acknowledged jurisdiction, a court of equity has so cautiously and sparingly exercised, as that of interference with judgments at law, or the sentences and decrees of other tribunals of competent jurisdiction, restraining their execution, or reopening the litigation they involved. The conscience of the court may be satisfied that injustice has been done—that the judgment or decree has not declared and enforced, but has defeated the right—the unvarying condition precedent to its interference, is, that it must clearly appear, the wrong occurred without *fault or negligence on the part of the party complaining.* Quieting litigation, silencing controversies, in the policy of that court is of more importance, than that justice may be done in every case.—*Bateman v. Willor*, 1 Sch. & Lef. 204.

“The argument of counsel seems to admit that the bill does not present a case within the original jurisdiction of a court

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of equity, but it is insisted that it may be supported as a bill for the correction of errors of law or fact occurring in a settlement in the court of probate under the statute.—(R. C. §§ 2274 and 2451.) These statutes do not authorize the interference of a court of equity, unless the party complaining, shows that the error, whether it be of law or of fact, of which he complains, occurred without fault or neglect on his part. The statute may enlarge the jurisdiction of a court of equity, authorizing it to intervene for the correction of errors at law, and may dispense with the inflexible rule, on which the original jurisdiction of a court of equity depends, that there must have been fraud, or accident, or surprise, or the intervention of the act of the opposite party, preventing the party complaining from obtaining redress in the previous litigation. While dispensing with these, it does not dispense with the other condition that the party seeking to reopen the decrees of the court of probate, shall show that the error of which he complains occurred without his fault or negligence.—*Otis v. Dargan*, 53 Ala. 178; *Boswell v. Townsend*, 57 Ala. 308. His want of diligence, is as fatal to any claim for equitable relief, under the statute, as under the rule defining the original jurisdiction of a court of equity. The bill affirmatively discloses, that on the final settlement in the court of probate, the complainant was represented by a guardian *ad litem*, who insisted the guardian should be charged with the moneys he had loaned without taking security. Every fact stated in the bill was shown to the court of probate, and the court improperly adjudged the guardian should not be charged. No exception was reserved to the ruling of the court, but there was full acquiescence in, and submission to the judgment rendered. If there had been full knowledge of the facts, and the guardian *ad litem* had abstained from presenting them for the consideration of the court, not being hindered by the act of the opposite party, it would scarcely be said, the bill presented a case for relief under the statute—that the complainant could be acquitted of fault or neglect. A party who has full opportunity, and yet from mere inattention or supineness, does not present his rights for adjudication to a proper tribunal, having jurisdiction of litigation involving them, closes the door to relief in equity. Can he be acquitted of fault or neglect, if he appears, presents his cause, and submits to an adverse decision, not taking the steps necessary for its revision in an appellate tribunal? What relieves him from the influence and operation of the maxim, *consensus tollit errorem*? Of what avail is his appearance, and entering into

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the litigation? If an appeal had been prosecuted from the decree, and every fact had been spread upon the record, which appears on the face of the bill, and affirmance of the decree, would have been inevitable, because no exception was reserved to the decision of the court. Was there not fault or negligence in the failure to reserve an exception; and how can it be said, the party failing to reserve it is free from fault or neglect. Fault and neglect is imputable, unless he intended submission to the judgment of the court; and if he submitted, that is as fatal as a want of diligence to any claim to equitable relief. We can not suppose the statute was intended to embrace a case of this character; but cases in which parties had not the opportunity of being heard in the court of probate, or of presenting their rights fully to that court. But a party who has had his day in court, has fully presented his evidence, and on it the court has pronounced judgment, if error intervenes must correct it on appeal. A construction of the statute, which would give it a larger operation, would practically abrogate the statute regulating appeals rendered by the court of probate on final settlements of executors or administrators, limited to six months, and would convert the equitable into an appellate jurisdiction. The statute limiting appeals from decrees of courts of probate, and the statutes which confer this equitable remedy, are parts of a common system, and that construction can not be just which would render them inharmonious in operation, or which would make each, serve the same purpose. An appeal is limited to six months—the equitable remedy to two years. Infants, married women, nor persons *non compos mentis*, are excepted from the limitation of appeals. These persons are excepted from the limitation of the equitable remedy, and are allowed two years after relief from disability to pursue it. If the appeal, and the bill in equity were regarded as concurrent remedies, it was useless to have limited appeals to six months, or to have subjected to the operation of the limitation, persons *sui juris*, excepted from the operation of the limitation of the equitable remedy. No party can invoke the equitable remedy who has had full opportunity to redress the error of which he complains, on appeal, and has by his own negligence lost the opportunity, and forfeited the right of appeal. The chancellor properly sustained the demurrer to the bill, and the decree is affirmed.

STONE, J., (dissenting.)—In the case of *Mack v. Cundiff*, 6 Por. 24, decided more than forty years ago, this court said

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that "chancery will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defence, or, unless he was prevented from availing himself of it as a defence by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." In *French v. Garner*, 7 Por. 549, the same doctrine was affirmed; and it has been reiterated by this court so often, in a series of decisions running all through the judicial history of this State, that I deem it unnecessary to cite them.—See 1 Brick. Dig. 666, § 376.

This principle did not originate in this court. It was borrowed from the English Chancery system, and was copied from a decree of Chancellor KENT, who, like our predecessors, found the doctrine ready moulded and established for his use.—See *Foster v. Wood*, 6 Johns. Ch. 87; *Lansing v. Eddy*, 1 id. 51. It did not pertain to the original, inherent powers of the court; but was engrafted upon its jurisdiction upon that principle, now long recognized, which is included in the general phrase, the prevention of irreparable mischief. Hence, to bring himself within its remedial influence, the party invoking its exercise must show, in fact, that he has a legal right, that he has failed to obtain it by no fault or neglect on his part, and that without the aid of the Chancery Court he is without remedy. The slightest inattention, or want of active diligence, which, if timely exercised, would have averted the wrong, has, in such cases, been always held to be fatal to the relief prayed; because, such inattention or want of active diligence disproved the great underlying averment, that the injury done was without fault or neglect on the part of complainant. The jurisdiction being exceptional, the party asking its exercise must bring himself clearly within its scope.

This conservative, healing principle, so necessary for the prevention of wrongs which sometimes, through fraud of parties, or accident without fault or neglect, have found expression in the solemn judgments of the purest and most elevated judicial minds, has been applied for their correction to the judgments of courts of the highest, as well as the lowest jurisdiction, when no other mode of redress could be administered. Judicial necessity gave it its birth, and it defines the boundaries of its domain.

The principles we have declared above were made a part of the statute law of this State, and the common law courts

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were clothed with a qualified power to exercise them, in two of the most numerous classes of cases in which their exercise might become necessary.—See Code of 1852, section 2406 *et seq.*; Code of 1876, section 3159 *et seq.* This statutory remedy, like the equity principles above, only aids parties who have been prevented from making their defense, by surprise, accident, mistake or fraud, without fault on their part. Under this statute, it has been held, and rightly so, that a party, to avail himself of its benefits, must repel all imputation of fault, neglect, or inattention, in defending his suit in the first instance.—See *White v. Ryan*, 31 Ala. 400; *Shields v. Brown*, *ib.* 535; *Allington v. Tucker*, 38 Ala. 655; *Dothard v. Teague*, 40 Ala. 583; *Callahan v. Lott*, 42 Ala. 167; *Ex parte North*, 49 Ala. 385; *Martin v. Hudson*, 52 Ala. 279.

It will be observed that in the two forms of remedy discussed above, no error or fault of the judge by whom the judgment is rendered, enters into the consideration. Accident to the defendant, without his neglect, or fraud of the opposite party which he could not avert, one or the other, is the fundamental fact to entitle a party to relief, who having a meritorious defense, has been denied the means of making it. The remedy is directed and shaped to redress misfortunes of the suitor; not the errors or faults of the judge. It concedes the judgment to be right on the facts presented, but claims that, without fault, the facts did not properly go before the court.

Section 3837 of the Code of 1876—the same as section 1915 of the Code of 1852—is as follows:

“Where any error of law or fact has occurred in the settlement of any estate of a decedent, to the injury of any party, without any fault or neglect on his part, such party may correct such error by bill in chancery, within two years after the final settlement thereof; and the evidence filed in the Court of Probate, in relation to such settlement, must be received as evidence in the Court of Chancery, with such other evidence as may be adduced.”

The first controlling thought which presents itself in contrasting the older equitable doctrine, first above considered, with the statute last above copied, is, that while the former principle furnishes redress of wrongs which have been inflicted on parties through their misfortune, without any charge of error or fault committed by the presiding judge, the latter only proposes to redress error committed by the judge or court.

Second: Under the older principle, errors of law are never

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redressed; nor are errors of fact, as fact. The whole aim and scope of the latter are the redress of errors of law and fact.

Third: Under the former, mere cumulative evidence is worthless, and is disregarded. Under the latter it is expressly provided for and authorized.

Let us analyze this section 3837, and see if its language does not force us to adopt one construction only. It confers the right to resort to chancery within two years after final settlement, "when any error of law or fact has occurred in the settlement, to the injury of any party." Not a word said about reserving an exception, about a new trial, about appeal, or about fraud. The language is, when an error of law or fact occurs. Whose error? Necessarily the court's. And the redress is as ample when the court commits an error of law, as when it commits an error of fact. The errors need not be those procured by fraud, or which cannot be redressed on appeal. The statute contains no such limitation as this. There is, however, a limitation in the section. The redress extends only to such errors of law or fact as occur without fault or neglect on the part of the party seeking redress. That is, if the error of the court be one of law, then the party complaining must not have caused, or contributed to it, by his fault or neglect. So, if the error be one of fact. *Volenti non fit injuria*. The grammatical construction of this sentence, forces the mind to the conclusion that the legislature meant, and only meant, that the error of law or fact committed by the court, must not have resulted from the fault or neglect of the party who complains that he was aggrieved thereby. Anything beyond this can not be found in the statute. To me it seems a stretch of interpretation, either to add important words to, or take them from the plainly expressed language of the statute.

Another view is conclusive to my mind, that the opinion of my brothers is not the true construction of this section of the Code so humanely beneficent to the most defenceless classes in any community. If they are correct, all the remedial powers of section 3837 *supra*, had been in full exercise by the chancery courts of this State, from the dawn of our jurisprudence. Why provide by statute, and in a code of laws framed by legal gentlemen selected for their professional eminence, the identical remedy, and confine it to a class of cases in one named court, which was known and recognized everywhere as already existing, and applicable to all civil causes in every court of record in the State? And,

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notably, why express this new grant of an old power, in language fundamentally dissimilar to that, in which we have all been accustomed to meet the legal principle which my brothers think the legislature intended to declare in the section of the Code under discussion? I submit the inquiry if the construction of my brothers does not leave section 3837 of the Code without any operation whatever.

Many of the judges of probate are unskilled in the law; and settlements, in that court, frequently pass through without thoughtful contestation, to the great damage of those entitled to share in the distribution. Hence the wisdom of providing a larger and more liberal system of revision of their decrees, than is considered necessary or safe as a general rule.

The cases of *Watts v. Gale*, 20 Ala. 817, and *Duckworth v. Duckworth*, 35 Ala. 70, cited by my brothers, should exert no influence in the construction of the section of the Code under discussion. The first of those cases was decided in 1852, before the statute became operative. The last makes no allusion to the statute, and contains no averment to bring the case within its influence. I think each of them as inapplicable to the case in hand, as is the leading case of *French v. Garner*.

I regret the necessity I feel myself under of dissenting from the views of my brothers; but I consider the question too important to be passed over in silence.

Griel & Bro. v. Lehman, Durr & Co.

Lien for Advances.

1. *To create a lien for advances the statute must be complied with.*—To constitute a valid crop lien for advances, not only the form but the spirit of the statute must be complied with in every essential particular.

2. *It is unnecessary to specify the land on which the crops will be produced.* The law directs that the instrument creating the lien shall be recorded in the county in which the makers of it reside; but it does not require that the land on which the crops are to be raised shall be specified.

3. *A stranger can not object that a contract is usurious.*—It is well settled that a stranger to a transaction will not be allowed to object that there was usury in it.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

The facts are contained in the opinion.

[Griel & Bro. v. Lehman, Durr & Co.]

W. A. GUNTER, and J. T. HOLTZCLAW, for appellant.

1. The proper construction of the law, giving a lien upon crops for advances, requires that the particular crop should be specified, so as to give notice to the world of the lien upon it, and the extent of the incumbrance. Both the language and the purpose of the statute, alike require that the particular crop advanced on, should be identified in the recorded instrument, so that notice should be given to the world, and the credit intended to be strengthened should not be crippled.

2. The contract in this case does not specify the crop on which the advance was made, nor does it appear that it was to operate on all the crops of the borrower. It is too uncertain to give effect to the statutory lien under the Revised Code, §§ 1858-9; 27 Ala. 437. The statute does not require in so many words that the name of the advancer should appear in the writing, or that the contract should be in the English language, but, we think, the name of the advancer should appear, and that, if the contract recorded, was in the Hebrew or Choctaw language, it would not be notice.

3. The purpose of recording the contract was to apprise the world of the particular lien. If the lien were to operate upon ten different crops in ten different counties and be recorded in only one, it would open a wide door to fraud, and the statute would cause oppression to the people, and be a hindrance to commerce. It is easy for the person seeking the benefit of this *new right*, to comply with the terms of the statute.

CLOPTON, HERBERT & CHAMBERS, and E. P. MORRISSETTE, for the appellees.—1. While it is essential that the requirements of the statute shall be complied with, it is not essential that anything more should be done. The existence of four things is necessary to give the lien, viz: 1. The advance must be made in some of the articles prescribed in the statute, or money furnished with which they can be purchased. 2. Such advancement must be made *bona fide*. 3. It must be declared in writing that such advance was obtained *bona fide* for the purpose of making a crop, and without it the party obtaining the advance would be unable to procure the necessary teams, implements and provision, with which to make a crop; and, 4. Such note or writing must be recorded within sixty days in the office of the judge of probate of the county in which the person obtaining the

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advance resides. The courts can not *add to or take away* any of these essential particulars.

2. The legislature designed to make the notice effectual, and to provide for a record of the note in that county where search would be naturally made; although the person obtaining it might cultivate land in counties other than that in which he resided, the latter was chosen as the place of record and notice.

3. The evidence of the witness that the advance was to enable the borrower to make his crops generally; not on one, but on all his plantations, was proper. It did not vary, alter, enlarge, or contradict the writing. It was simply to identify the crop alluded to and mentioned in the writings.

4. It was not necessary to constitute a lien that any particular crop should be mentioned. If there was any ambiguity it was latent, and could be explained by oral testimony. 2 Phil. Ev. (9 ed.) 297, 329; 1 Greenl. Ev. § 297; Broom's Leg. Max. pp. 474-6. The appellants had constructive notice of the lien, because the instrument was recorded according to the requirements of the statute. This was sufficient to put the appellants on inquiry, and if they failed to make enquiry they were guilty of negligence, and have no remedy.—13 Ala. 50; 16 Ala. 581; 22 Ala. 743.

5. The charge requested by the appellant intimating the existence of usury in the transaction was properly refused. The party to the contract alone could have raised the objection; a stranger can not do it.—45 Ala. 429, 582.

6. The history of this statute and the time of enactment show that it should be liberally construed, in order that all the benefits intended by it should be realized by the people. It was enacted in January, 1866, when our fields had been desolated, our people impoverished, and confidence destroyed. It was the confidence reposed in this statute that brought foreign capital here, distributed it among our planters "to grow green again and ripen to future harvests."—6 P. 109; 33 Ala. 674.

MANNING, J.—The bales of cotton which are the subject of this controversy, were a part of the crop made in 1875 by one Ross. He cultivated several farms that year, not all of them in the same county. He resided himself in Chambers county. Under "the crop-lien law," (Code of 1876, §§ 3286 (1858), 3287 (1859) and 3288 (1860)), he obtained advances of appellees, Lehman, Durr & Co., and executed to them notes or writings therefor in the form pre-

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scribed by the Code, which were recorded, as it provided, in Chambers county, where Ross resided. The cotton in controversy was raised on a farm in Elmore county. The objections to the writings, under which appellees claim this cotton by virtue of a crop-lien under the statute,—are, that they do not specify the farm on which the crop was to be made, and were not recorded in the county where that farm was situated.

There is no question that the advances were made in good faith to enable Ross to make a crop. In the case of *Boswell & Wooley v. Carlisle, Jones & Co.* 55 Ala. 554, the moneys due the former were not for advances made to enable the borrower to raise a crop; but an untrue allegation that they were, which the person who signed the writing testified he did not know was in it, was contained therein. And it was in reference to that case that we are represented, inaccurately, as having said: "To constitute a valid crop-lien for advances, not only the form but the spirit of the statute must be complied with in every essential particular." In the present case there is no pretence that the writings contain any misrepresentation, or that there was any unfairness between the advancers, Lehman, Durr & Co., and Ross.

The cotton was brought from Elmore county into Montgomery, and sold here to appellants by one Danforth, who said it had been given to him by Ross for wages due from the latter: and possession of it was obtained by Lehman, Durr & Co. through a suit against Ross, commenced by a writ of attachment according to the statute. The only question presented, in this relation, is the one before mentioned; that is whether the writing was not insufficient to create a lien on the cotton in controversy, by reason of its not specifying the farm on which the crop was to be made and of its not being recorded in Elmore county? For an answer to this question, we must look to the statute.

This act of legislation was evidently passed with reference to the condition of the country after the late civil war. Of land to be tilled there was no end; and unsettled and needy laborers were abundant. But "horses, mules, oxen, necessary provisions and farming tools and implements" were scarce; and those who had farms, or could easily obtain them, were generally without money; while the land owners were, to a large extent, in debt, and their lands under mortgages. It seemed, therefore, to the General Assembly that it would be a good policy, one of encouragement to the great and vital interest of the State, agriculture, to provide by

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this crop-lien law, a security, which should take precedence of any other, except the landlord's lien for the payment of rent, and not be impaired by exemption laws, for ensuring the payment or reimbursement of those who would advance any of the articles aforesaid, or money with which to buy them, in order to enable the persons to whom such advances should be made, to cultivate their lands. This security was to be afforded by a lien on the crops these persons should respectively, be thus enabled to make. And the statute providing for it, prescribes all that the writings which are to be the evidence of the lien, must contain,—and when and where they shall be recorded. It does not require that the land shall be specified on which the crops are to be made. And it directs that the writings shall be recorded in the county where those who executed them reside. If the law needs amendment in these respects, it is for the legislature to amend it. We are not authorized to add any thing to the enactment.

Whether appellants would have been benefited or not, if the law had been as they say it should be, we need not inquire. When the cotton was taken away (as in this instance it was, and into another county,) from the farm on which it was grown, it could not be recognized as a product of that place. It would generally be more easy to ascertain *whose* it originally was, than *where* it had been raised; or if the latter was known, there would rarely be any difficulty in learning whose the place was, that year. Certainly until the name of the person who made the crop, be ascertained, it could not be discovered by the records, whether there was a crop-lien on it or not. And the name of this person being known, the law informs everybody that it is in the county of his residence, that search must be made for the evidence of such a lien.

We think the objections made to the instrument in this case are not well founded: and as before mentioned, there is no pretence that there was any lack of good faith in taking it.

It follows also from the fact that the objections to the instrument were not well founded, that the objection resting upon them, made to the introduction of the record of the attachment suit, was properly overruled.

The testimony of Morrisette was introduced, with reference to the evidence that Ross cultivated several farms in 1875, and to show that the advances he received from Lehman, Durr & Co. were not made for any particular farm, but to support him in his business as a planter wherever carried

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on. It was directed against any suspicion that advances which have been made for the cultivation of one tract of land, were improperly employed to charge the crop made on another for the payment of them. The evidence, therefore, was not in aid of—much less to vary—the contract of which the writings were the evidence,—but to repel any inference against the honesty of the transaction. It was not illegally introduced.

The charge asked and refused concerning the subject of usury, as framed, was abstract. It does not ask the court to decide on the contract before it, but to instruct the jury that a contract containing certain terms *may* be usurious. It does not mention all the provisions of the contract in evidence. Besides, it is well settled that a stranger to a transaction will not be allowed to object that there was usury in it.

Let the judgment of the Circuit Court be affirmed.

Daughdrill v. Edwards et al.

Injunction. Specific Performance.

1. *A court of equity will not enjoin an action of ejectment brought to recover land not conveyed by deed.*—A court of equity will not enjoin an action of ejectment brought for the recovery of land, sold for Confederate treasury notes, when no deed of conveyance had been executed, and the promissory note given for the purchase-money, had matured after the surrender of the Confederate armies in 1865.

2. *An alleged willingness to comply with a contract is not a tender of payment.*—A specific performance of such a contract will not be decreed upon the allegation of the complainant, that he is ready and willing to comply with his contract in every particular, "and offering to do, whatever this court may order to be done in the premises respecting said Confederate money." This is not equivalent to an offer to pay whatever may be found due the defendant.

3. *The value of land sold during the war must be estimated in lawful money at the time of the sale.*—The value of land sold under the circumstances shown by the record in this case is the value of the property in lawful money at the time of the sale.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. NEIL S. GRAHAM.

The facts are contained in the opinion.

LEWIS E. PARSONS & GEO. W. PARSONS, for appellant.

GEORGE S. WALDEN, and J. T. HEFLIN, for appellees.

[Daughdrill v. Edwards.]

STONE, J.—On the 28th December, 1864, Daughdrill purchased from Edwards a lot and residence in Talladega, made a small cash payment, and gave his two notes for the residue of the purchase-money, due severally May 1st and September 1st, 1865, each bearing interest from date, and each payable “in Confederate money, if paid at maturity.” Edwards gave Daughdrill a bond to make him title, after the maturity and payment of the notes; and he put Daughdrill in possession of the property. No title has ever been made, and Edwards brought his action at law to recover possession of the lot and dwelling. Therefore Daughdrill filed this bill, the object of which is to have specific execution of Edwards’ agreement to convey, and to enjoin perpetually the said action at law. The chancellor dismissed the bill at the costs of Daughdrill, who brings the case to this court by appeal. Two grounds are urged before us why complainant should have relief; First, tender of the Confederate money, &c., which is claimed as payment in effect. The bill shows that the contract was made in the town of Talladega, Alabama, where Edwards then resided; and that immediately afterwards, Edwards removed to Mississippi, carrying and retaining the notes with him, and that Daughdrill did not know, and could not learn his residence or address. The averments of the bill bearing on the question of tender and attempted payment, are as follows: “orator states that just before the first note became due, he came to Talladega where the said Edwards lived when the trade was made and the notes given, and brought with him six thousand five hundred dollars, together with interest on one-half thereof up to that time, viz: four months after the 28th day of December, 1864; and interest on the other half thereof, to eight months from the 28th of December, 1864; and on the day when said note first payable became due, he was ready to pay each of said notes, but the said Edwards could not be found; and orator was informed that he had removed to some part of the State of Mississippi, and carried the notes with him, but where, or in what part of said State, orator could not learn.” He then averred Edwards kept an agent at Talladega, and that he, Daughdrill, inquired of the agent for the notes, but that Edwards had carried them with him to Mississippi. The bill then avers “that when said Edwards removed from Talladega he intended to settle somewhere in the West, and he so stated to his friends about the time he was leaving Talladega; and the only information orator could obtain as to his whereabouts,

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was that he had stopped somewhere in the State of Mississippi. The first communication orator had from said Edwards purported to be written from some place in that State, sometime after the surrender, and was directed to orator at Mobile, where orator was then living, and where he had lived for many years before the war. Said letter . . . stated that he (Edwards) had the notes with him in that State." The bill further charges that, failing to find the notes, or an authorized agent of Edwards in Talladega, Daughdrill deposited the Confederate money, sufficient in amount to pay the notes, principal and interest up to maturity, in an insurance company and banking house at Talladega, for the payment of said notes, where it has remained in the identical bills ever since. The bill further charges that it was Edwards' duty to give complainant notice of his whereabouts, and he failed to do so.

The answer of Edwards admits he removed to Mississippi and carried the notes with him, and had them there when they matured. He answers and pleads that at the time of the trade Daughdrill was informed of this, understood it, knew the place to which Edwards intended to remove, and did remove, and promised to pay the notes, saying he could pass by said Edwards' future home of which he was thus notified. The answer denies the other charges stated above. The testimony of Daughdrill is, that he made inquiry at Talladega, of the agent of Edwards and others, for the notes that he might pay them; and that failing to find them, he deposited the money in special deposit as alleged—and the money remained there, without change of bills, until the filing of the bill in this cause. The secretary of the insurance company confirms him as to the deposit, and that the money remained there unchanged, until this witness was called to testify, when he made the bills a part of his deposition. The testimony of this witness tends to show that the Confederate money was deposited a considerable time before the maturity of the first note—May 1st, 1865. On the other hand, Edwards testifies to the truth of the averment, that Daughdrill was informed of the place to which he intended to remove, and did remove, and stated he could call by there, and make payment.

Two circumstances tend strongly to show that Daughdrill did not consider the debt to Edwards discharged, by the deposit made by him, and attendant circumstances. In June, 1865, long after the deposit was made, and more than a month after the overthrow of the Confederate cause, (by which the value

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of Confederate money was destroyed,) Daughdrill sold his claim on the house and lot to Savery, for a trifle to be paid to him Daughdrill, and a written obligation to him Daughdrill, by which Savery bound himself to pay and take up said purchase-money notes given by Daughdrill to Edwards. And, on 13th January, 1866, Daughdrill wrote to Edwards, as follows: "In relation to the amount due you for the place I purchased from you in Talladega, I have only to say that I turned the trade over to your old friend Joseph Savery. Soon after you left I found it necessary to move to Mobile where I had lived thirty years, and let him take the trade off my hands. I have his obligation to hold me harmless against the notes you hold on me, and I transferred to him the bond for titles which you gave me. I think he expects to settle with you for the notes, at the value of the money at the time the papers bear date, or at the time of their maturity. . . . Write to him about it, as I have now no interest in it." Savery, without complying with his contract, died in March, 1866, and his estate was insolvent. So, the trade between him and Daughdrill fell through. In this state of the record, it is doubtless if this feature of the case is made out on the facts. We say nothing of the law of the question above presented. We prefer to rest our opinion on a different principle.

It will be remembered that the first of Daughdrill's notes matured May 1st, and the last September 1st, 1865. General Lee surrendered his army at Appomattox April 9th, and General Johnston surrendered his at Durham station April 26th, 1865. The last of these surrenders was made five days before the maturity of Daughdrill's first note. Confederate money had a purchasing power, and hence had an admitted value, in all places under Confederate control, so long as the civil war lasted. It was a standard of value, paid debts, purchased property; and transactions, based on it as a consideration, were upheld in the highest judicial tribunals of the land. This, on a high principle of public policy, springing out of the necessity that every community shall have a circulating medium, without which it is difficult to conserve life, health, or public order.—*Thorington v. Smyth*, 8 Wall. 1; *Delmas v. Insurance Co.* 14 Wall. 661; *Atlantic, Tennessee and Ohio R. R. Co. v. Car. National Bank*, 19 Wall. 548; *Ferguson v. Lowry*, 54 Ala. 510; *Waring v. Lewis*, 53 Ala. 615; *Hutchinson v. Owen*, and *Tindel v. Drake*, at the present term; *Ponder v. Scott*, 44 Ala. 241. But this value existed only so long as the Confederate forces had control.

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When that struggle for separate national life ceased, Confederate money had no value, actual or conventional. Before either of these notes matured, it had ceased to have any value whatever. Nay, under the then re-established and recognized authority of the government of the United States, it could not circulate as money. If an attempt had been made to pay in Confederate money, either on the first of May or first of September, 1865, no legal rights could have grown out of it, because of the utter worthlessness of the thing tendered. The question then comes to this: Shall Daughdrill be exonerated from all payment for the house and lot purchased, because, between the date of the contract and the agreed time of its fulfilment, the fortunes of war had rendered its literal performance civilly impossible? And shall he have specific execution of his contract, when he has not paid the consideration promised?

Ever since the war, courts have encountered difficulties in solving questions like this. In *Kirtland v. Molton*, 41 Ala. 548, the notes sued on were payable in Confederate currency. Two of them were due before the surrender; but the value of Confederate money, compared with lawful money of the United States, was then very small. A third note was payable in June, 1865, when Confederate notes were valueless. The question was the measure of recovery. A majority of this court, as then constituted, decided that the measure of damages was the value of the specific currency at the maturity of the notes respectively. Under this ruling there could have been no recovery on the third note, while the recovery on the first and second notes would have been scaled to a very low figure. The *personnel* of this court underwent a change, when the reconstruction measures went into operation, and the same question came again before this court, in *Herbert v. Easton*, 43 Ala. 547. It was then held by our predecessors that the criterion of recovery in such case was the value of the property sold, in lawful money, at the date of the sale. This court has since undergone another entire change in its membership; and while we find great difficulty in reconciling the ruling with established rules of law, the later ruling has been uniformly followed.—*Riddle v. Hill*, 51 Ala. 224; *Ervin & Jones v. Hill*, *ib.* 580; *Whitfield v. Riddle*, 52 Ala. 467; *Tutwiler v. Erwin*, at the present term. We have felt the more reconciled to this, because it harmonizes substantially with the rulings of the Supreme Court of the United States on this vexed question.—*Thorington v. Smyth*, 8 Wall. 1; *Stewart v. Salaman*, 4 Otto, 434.

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We have, then, the case where, under the law, it had become impossible to execute the contract as intentionally made. We are unable to lay down any measure of liability, other than that stated above; namely, the value of the property, in lawful money, at the time the contract was made, less the cash payment, which in this case is one-fourteenth of the purchase-money. The actual payment made, whether in specie, or specie and a mule, was received as the substitute of \$500 of the \$7,000, which is one-fourteenth. We do not intend to say that the gold valuation of the payment made, multiplied by fourteen, determines the value of the lot. That must be shown by testimony. When shown, then thirteen-fourteenths of that value with interest, is the sum which Edwards is entitled to, before he can be compelled to execute specifically the contract of sale. Daughdrill invokes the power of the court in this case, and what we have defined above, shows what he must offer to do, and do, before he can have specific execution of his executory agreement. Less than that does not satisfy the conscience of the court, and does not call into exercise its active powers in favor of complainant. This is what is meant by the court's sound discretion, in granting or withholding relief on bills for specific performance.—1 Brick. Dig. 692, §§ 758, 759, 760; *Black-wilder v. Lawless*, 21 Ala. 371; *Ellis v. Bowden*, 1 Ala. 459; *Seymour v. Delancey*, 6 Johns. Ch. 222; 1 Story Eq. Jur. §§ 742, 749, 750; *Bank of Alexandria v. Lynn*, 1 Pet. 376; Story Eq. Jur. § 769, 769a; *Daniel v. Collins*, 57 Ala. 625.

We do not intend to be understood as affirming that, if Edwards were the actor in this case, Daughdrill would be compelled to do and perform what we have laid down above, as the condition upon which he can successfully invoke the active powers of the court. Very far from it. Chancery is very exacting in the measure of right which will call its powers into exercise in such a case as this. It frequently denies relief to A, when it would alike refuse all counter-relief to B. There are many cases in which it leaves parties severely alone, and to such remedies as the law courts can furnish them. In this connection we commend the opinion of the chancellor, as a sound exposition of the law affecting this question. The complainant is entitled to no relief on the feature and aspect of the bill above discussed.

In the second place it is contended for appellant, if the bill fail on its primary aspect, then the chancellor should have decreed him relief, on condition he paid the purchase-money and interest; that the parties themselves fixed the

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value of the land in good money, at one twenty-fifth of the agreed price, which would be two hundred and eighty dollars; that of this sum complainant had paid twenty dollars at the purchase, leaving due two hundred and sixty dollars with interest, and that the chancellor should have allowed him the privileges of paying that sum, and then decreed him title. We have shown above that the good-money price of the house and lot has not been fixed by the parties at two hundred and eighty dollars, but the value remains to be ascertained, on testimony taken and to be taken. The averments of the bill on which this aspect of relief is claimed, are as follows: "Orator is now ready and willing to comply with his said contract in every particular, if the facts herein before stated do not amount to a performance, or readiness to perform said contract on his part. Orator insists that the facts stated in this bill show he was ready and willing to perform, and able to perform said contract on his part, and that he did perform it as far as he was able to do so; and if he did not perform it to the letter, it was because the said Edwards had removed from the State, and taken the notes with him; or, if he left them with any person at Talladega as his agent for the purpose of receiving payment, he failed to give orator notice thereof, either by general public notice, which is usual in such cases, or a special notice of the agent's name and place of residence. . . . Orator brings into court the identical Confederate money which he deposited as herein before stated in payment of said notes, and he deposits the same as the court may direct; and he also offers to do whatever the court may order to be done in the premises, respecting said Confederate money." This language is not sufficient. Being "ready and willing to comply with his said contract in every particular," and offering to do "whatever this court may order to be done in the premises respecting said Confederate money," are not equivalent to an offer to pay whatever may be found due to defendant of the purchase-money.—*Nelson v. Dunn*, 15 Ala. 501; *Spoor v. Phillips*, 27 Ala. 193; *Freeman v. Jordan*, 17 Ala. 500; *Branch Bank v. Strother*, 15 Ala. 51; *Cain v. Gimon*, 36 Ala. 168; *McGuire v. Vanpelt*, 56 Ala. 344; *Rogers v. Tarbert*, 58 Ala. 523.

The objection that the chancellor did not dismiss the cross bill is not sustained by the record.

Decree of the chancellor affirmed.

[O'Connor v. Chamberlain]

O'Connor v. Chamberlain.

The Statutory Separate Estate of a Married Woman.

1. *The statutory separate estate of a married woman is purely legal.*—The statutory separate estate of a married woman is not an equitable but a purely legal estate, and can be charged only to the extent and in the manner prescribed by the law creating it.

2. *It can be charged only for articles of support for which the husband is liable.*—The liability of the husband for articles of comfort and support is an indispensable element of the right to charge the wife's statutory estate with the payment of them; and no order subjecting it to sale can be made unless it is based on a judgment in a suit against both of them, or is preceded by a judgment against the husband alone.

3. *If credit for necessities be given solely to the wife, her statutory estate is not liable.*—The agency or consent of the husband is not material in fixing his liability to pay for necessities furnished his wife; but if the credit be given solely to the wife, in exclusion of all liability of the husband, no recovery can be had against him; and an indispensable element of a charge against the statutory estate of the wife is wanting.

4. *A court of equity can not impose on it burdens not imposed by the statute.* The liability of the statutory estate of a married woman is fixed by law, and a court of equity is as powerless as a court of law to dispense with the requirements of the statute, or to subject it to burdens beyond what the statute imposes.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. CHARLES TURNER.

The facts are contained in the opinion.

WATTS & SONS, and PHELAN & CLARKSON, for appellant.

1. It is a general rule, when a statute creates a liability unknown to the law and provides a remedy, the remedy thus provided is exclusive. But there is an exception to the rule. It is when the statute creates a new liability and provides no remedy or an inadequate one, then the courts of law and equity furnish an appropriate remedy according to the nature of the case.—32 Ala. 703; 49 Ala. 507; 15 Ill. 9; 14 ib. 83; 11 Bush, (Ky.) 538; 9 Johns. 507; 5 Mass. 514; 10 Pick. 383; 25 Ala. 644; 13 Barb. 217.

2. Under the statute of 1850 (woman's law), which uses language similar to section 2376 of the Revised Code, it was held that the wife could be sued at law after the death of the husband.—25 Ala. 644. The case of *Carter v. Wann*, 45 Ala. 343, is not in conflict with *Cunningham v. Fontaine*, in 25 Ala. 644, although overruled by Judge PETERS. The

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Code fixes no personal liability on the wife for such contracts, and only fixes a liability on her separate estate.—31 Ala. 438; 32 Ala. 599. And the suit against the wife at law is not *in personam*, but *in rem*.—52 Ala. 161. *Carter v. Wann* overrules *Cunningham v. Fontaine*, *supra*, but it is erroneous.

3. The wife has the right to make the contracts, provided the articles bought are such as the Code describes. It matters not who buys or makes the contract for such things as are covered by the statute.—31 Ala. 438; 35 Ala. 653; 52 Ala. 161; *Janney v. Buel*, 55 Ala. 408. If the husband dies before the account is due, is the property of the wife (which the statute makes liable) to be absolved from all liability because the husband dies before a suit at law can be brought? Such a construction of the law would be not only unjust, but absurd. Under the circumstances the remedy is in equity to enforce a liability which the statute fixes on the property of the wife.—1 Story Eq. Jur. §§ 32, 33.

4. The fundamental doctrine is where there is a right recognized by law, and no plain, adequate and complete remedy at law, a court of equity will give the appropriate remedy for the enforcement of the *recognized right*. Here the statute recognizes the right—the *liability of the wife's estate to pay the contracts named in the statute*. The remedy at law is not adequate or complete—in fact there is no remedy provided by the statute for the enforcement of this recognized right when the husband or wife dies before the enforcement of this right.

5. Cord, in his work on "Legal and Equitable Rights of Married Women," says "that the charge against such estates can only be enforced in equity, unless the statute provides a remedy at law—§§ 333, 319, 335. The remedy against her estate existed before the statute. And giving the remedy at law does not take away the equitable remedy, unless in the statute there are words of prohibition or restriction.—28 Ala. 629. In equity, when the wife has a separate estate, and the contract was for her benefit, or the benefit of her estate, the separate estate was subjected to the payment of the contract. 22 Barb. 371; 18 N. Y. 265.

6. In Alabama, the whole separate statutory estate of the married woman is charged by the statute with the certain contracts described in the statute; and a remedy has been provided at law, by the statute, but this does not deprive equity of its jurisdiction, when the remedy thus provided is inadequate, or where it becomes impossible of enforcement at

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law by the death of either husband or wife.—37 N. Y. 35 ; 7 Paige, 112. In this case the facts show that Mrs. Chamberlain made the contracts ; they were for such articles as the statute fixes liability on the separate estate for the payment of. The contracts were made by the wife herself on the faith of the separate estate. Equity will not permit the death of the husband to extinguish this clear liability.

W. S. ERNEST, and R. H. PEARSON, for Appellee.—1. The bill is without equity, and should be dismissed because it shows on its face that the property sought to be charged is the statutory separate estate of the wife. It also shows that the goods were sold to the wife *alone*, and the husband was not charged or looked to for payment in any event. But it was expressly understood that the husband was not to be held for the payment of the account.

2. If the appellant has any remedy, it is by an action at law—upon the principle that upon the death of the husband the right of action survived against the wife.—25 Ala. 644. But it is settled that this right of action against the wife does not survive.—45 Ala. 443 ; 51 Ala. 245.

3. The death of the husband before suit, confers no jurisdiction on a court of chancery. The right to subject the separate estate for articles of comfort and support did not exist at common law ; it is given only by the statute.—*Short v. Battle*, 52 Ala. 456. The wife, at common law, can not bind herself or render her separate estate liable. When such a power is given, it is only to the extent conferred by the act, and being in derogation of the common law, must be strictly construed.—9 Ala. 43 ; 20 Ala. 180 ; 30 Ala. 591.

4. The only remedy for enforcing this statutory right, is by suit at law against the husband alone, or against the husband and wife jointly.—Code, § 2376 ; 45 Ala. 443 ; 51 Ala. 245 ; 34 Ala. 512. The death of the husband confers no right upon a creditor to go into equity. Nor will the court take jurisdiction upon the ground that “where there is a right there is a remedy,” for there is no right apart from the statute.—Authorities *supra*, and *Short v. Battle*, 52 Ala. 456. This right and this remedy must go together. One can not exist without the other.

5. The bill shows that a large part of the account sued upon is for wearing apparel for the husband. Such articles are not a charge upon the estate.—31 Ala. 438. It shows also that the goods were sold to the wife alone, and by express agreement the husband was not to be looked to for the

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payment of the account. Since this is true, the husband could never have been responsible for the payment for the goods; and the bill should have been dismissed on this ground.—34 Ala. 496.

BRICKELL, C. J.—The original and amended bill filed by the appellant, in substance allege, that the appellee in 1872 and 1873, a married woman, wife of one Charles Chamberlain, since deceased, contracted on her own credit, and on the faith of her statutory separate estate, an account with appellant for articles of comfort and support of herself and family. The husband had no property or credit, and the credit was given wholly on the faith of the statutory separate estate of the appellee. The prayer is, that the estate of the appellee be subjected to the payment of the account, and for general relief. A demurrer was interposed, assigning for cause a want of equity in the bill, which was sustained, and the bill dismissed. From the decree, this appeal is taken.

The statute declares a liability on the separate estate of a married woman, which it creates, “for articles of comfort and support of the household, and for the tuition of the children of the wife, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law.”—Code of 1876, § 2711. The construction of this provision, adopted soon after its enactment, and which has since been adhered to steadily, is, that fixing a liability on the husband is an essential, indispensable element of the liability of the statutory estate.—*Durden v. McWilliams*, 31 Ala. 438; *Ravisies v. Stoddart*, 32 Ala. 599; *Eskridge v. Ditmars*, 51 Ala. 245. The necessities of the wife, or of the family, may be supplied under circumstances not imposing on the husband responsibility to answer to the person who assumes to supply them. The wife may elope, though it be not with an adulterer, and the husband is not chargeable with necessities, unless he receives her back again. The separation puts all persons on inquiry, and at their own peril, they give her credit. Other instances in which her necessities may be supplied, without fixing liability on the husband, readily occur to the professional mind.—2 Kent, 132. The absence of his responsibility is as fatal to a recovery of, or against the estate of the wife, as would be the absence of the specific consideration the statute expresses—*articles of comfort and support of the household or the tuition of the children of the wife*. Neither the words or the policy of the statute would be satisfied by any other con-

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struction. The only judgment which can be rendered so far as the wife or her estate is concerned, is a judgment condemning the estate to sale; and this judgment can not be rendered, unless it is accompanied, or preceded by a personal judgment against the husband. The liability of the estate is "to be enforced by action at law against the husband alone, or against the husband and wife jointly," are the words of the statute. And if the suit is against the husband alone, judgment must be obtained, and execution thereon returned *not satisfied*, before any proceeding can be had against the statutory estate of the wife.—Code of 1876, § 2712. The liability of the estate is therefore dependent on the liability of the husband. Nor does the statute assume to impose on the husband a liability which does not exist without it. It is the *common law liability of the husband* which is to be enforced, and not another new and distinct liability, as is directly expressed by the words "for which the husband would be responsible at common law."

The bill avers the articles purchased by the wife, were for the support and comfort of the household—in other words, they were necessities, which at common law, the wife had an implied authority to purchase, or which in the absence of a proper provision for her maintenance, a stranger could have supplied to her on the credit of the husband. A duty of the husband imposed by the common law, which the statute does not lessen or modify, is to maintain the wife suitably to her situation and to his condition in life. It is this duty and the liability consequent upon it, to which the statute refers, when it declares the contracts for necessities for which the statutory estate is liable, are such as the husband would be responsible for at common law. If the husband is without fortune, what are necessities must be graduated to the degree of the wife's fortune, and to her social position, and to this extent only, it may be in some cases, the statute will enlarge the liability of the husband as defined at common law. The statute intends that the measure of the husband's liability is ascertainable not as at common law from the degree of his fortune only, but from the degree of that fortune, and the degree of the wife's statutory estate, of which he is trustee, and to the rents, income, and profits of which he is entitled. The agency in making the contract is not, as it was not at common law, material. The husband or wife, separately or jointly may enter into the contract—or, without contract with either, a stranger may supply the wants of the wife, and a liability against the husband,

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and against the statutory estate arises by operation of law. The liability of the husband from the common law—the liability of the estate, from the statute. The husband was at common law, and is yet, presumed to assent to and authorize the wife to purchase necessities, and becomes liable on her contracts of which they are the consideration. Or he may have dissented from, or even forbidden such contracts, yet he would be liable, if the seller could show that the things purchased were absolutely necessary to the comfort of the household.—2 Kent, 146; *Hughes v. Chadwick*, 6 Ala. 651; *Zeigler v. David*, 23 Ala. 127; *Pearson v. Darrington*, 32 Ala. 227. But though the wife be living with the husband, if on her own credit, or to the express exclusion of the credit of the husband, she obtains necessities, the husband is not liable.—2 Kent, 146; 2 Bright, Hus. and Wife, 17; *Pearson v. Darrington supra*. The complainant not having extended credit to the husband, extending it alone to the wife, and to use the language of the bill, *upon the faith and credit of her separate estate*, excluding expressly the credit of the husband, the element of his responsibility, essential to the charge of the statutory estate, the statute declares, is wanting. Courts have no power to dispense with any element of a statutory charge or liability. If the liability of the husband could be dispensed with,—the specific meritorious consideration of the contract for the satisfaction of which the charge on the estate is created, could as well be dispensed with, when that liability existed, and this consideration was wanting. If in an action at law against husband and wife, the facts were stated in the complaint, which are stated in the bill, negating responsibility of the husband, the complaint would be demurrable, and the action could not be supported. It must be borne in mind, that the liability of the estate is purely statutory—having no existence independent of the statute, which defines and declares, and bounds and circumscribes it, by its own rules and limitations, and the courts can not extend it. An extension of it, to contracts for which the husband is not responsible would not only violate the words, but would be inconsistent with the policy and spirit of the statute. Husband and wife remain, in a large sense, as at common law, but one legal person, the existence and authority of the wife being merged in that of the husband, the duties of the husband and his authority as the head of the family and the protection of the wife, are not lessened, but are preserved. The duty of maintaining her, and the family still devolving on him, the corresponding right to keep her maintenance and that

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of the family within the limit of necessities—of adapting the domestic expenditures to the situation and condition in life of the family, is not disturbed. Nor could it be disturbed, without disturbing the harmony of the relation, and inviting dissension, and contracts involving inconsistent obligations. The property of the wife rests in the husband as trustee, and and he has the right to manage and control it without liability to account for the rents, income, or profits.—Code of 1876, § 2706. The rents, incomes and profits, are thus donated to him by law, and are freed from liability for his debts. The purpose of the donation is, to enable him to discharge the duty of maintaining the wife and family, and to avoid the causes of litigation, which must arise, if he was liable to account for them as trustee. If contracts for necessities could be made by the wife, which do not involve him in liability, and the estate charged with their payment, his authority as husband would be invaded, and his right, duty and authority as trustee, could not only be impaired, but destroyed, in violation of the spirit and policy of the statute. The husband may be insolvent, and without credit, but neither lessens his rights or his duties. And if because of his insolvency, others assume to enter into contracts with the wife, on the credit of her statutory estate, to the exclusion of his responsibility, they make a contract the statute does not charge on the estate. The case made by the bill can derive no aid from the statute, if in any event, a court of equity would have jurisdiction to enforce the statutory charge.

It is insisted however that the wife has capacity to bind her statutory estate, by her own contracts for necessities, and a court of equity has original inherent jurisdiction to enforce such contracts against the estate. The incapacity of the wife to contract, at common law, was general and absolute, not arising from any want of discretion, “but because she has entered into an indissoluble connexion, by which she is placed under the power and protection of her husband, and because she has not the administration of property.”—2 Kent, 150. In *Murray v. Barlee*, 3 Myl. & K. 209, (9 Cond. Eng. Ch. 7), said Lord BROUGHAM, “that at law a *feme covert* can not in any way be sued, even for necessities, is certain. Bind herself or her husband, by specialty she can not; and although living with him, and not allowed necessities, or apart from him, whether on an insufficient or an unpaid allowance, she may so far bind him, that those who furnish her with articles of subsistence may sue him, yet even in respect of these she

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herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of the husband; and she is no more recognized than is *cestui que trust*, or the mortgagor, the legal estate, which is the only interest the law recognizes, being in others." In a court of equity however the rule is different. The separate existence of a wife, so far as property given or settled to her separate use is concerned, has long been recognized. From her capacity to take and hold such property, sprung another doctrine; that if not restrained from alienation, her power to contract in reference to it, or to bind it, was an incident to her ownership. The concurrence or consent of her husband to the alienation or contract was not required—the whole principle resting on the theory that as to such estate in equity she was deemed a *feme sole*. 1 Lead. Eq. Cases, 687 (4th Am. ed.) In some of the courts of this country, it is held, that the power of the wife over the estate settled to her separate use, is derived from and dependent upon the grants expressed in the settlement; and "that instead of having every power from which she is not negatively debarred in the conveyance, she shall be deemed to have none but what is positively given or reserved to her." This is not however the doctrine of the English Court of Chancery, which was at an early day adopted and has since prevailed in this state. If the settlement contains no restraint or limitation, the capacity of the wife to contract, binding her separate estate is an incident of ownership, and as unlimited as if she were a *feme sole*.—*Gunter v. Williams*, 40 Ala. 561; *Paulk v. Gillespie*, 34 Ala. 541; *Barker v. Barker*, 32 Ala. 473; *Bradford v. Greenway*, 17 Ala. 797; *Forrest v. Robinson*, 4 Port. 44; *Collins v. Rudolph*, 19 Ala. 616. But if the settlement expressly limit the power of alienation—if it is confined to particular uses or to a particular mode of disposition, the wife has only the power which is conferred, and it must be exercised for the uses, and in the mode prescribed. The fallacy of the proposition we are considering, lies in the supposition that the statute creating the separate estate of the wife, creates an estate analogous to that of the equitable separate estate, and that alienation is an incident of the ownership which it confers. The purpose of the statute, is obviously more *to disable* the husband, than *to enable* the wife; and with the exception of freedom from liability for the debts of the husband, and security of title to the wife against his disposition or alienation, the estate created, has

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no feature or quality in common with that of the equitable estate of the wife.

The statutory estate is not an *equitable*, but a *legal* estate. Courts of law are bound to its recognition, and the wife, if compelled to resort to legal remedies for its recovery, can pursue them only in her own name. Or, if the estate is claimed adversely, an action at law for its recovery must be prosecuted against her alone.—Code of 1876, § 2892. The husband has no authority to receive the equitable estate of the wife, without consent or concurrence; but the statute confers on him such authority as to her statutory estate, and his receipt in which she does not unite, nor to which she yields assent, “is a full discharge in law and equity.”—Code of 1876, § 2710. The value of the statutory estate, but not of the equitable estate, is subtracted from the value of her dower in the lands, and her distributive share in the personal estate of her husband, if she survives him. The husband may be tenant by the curtesy of her equitable real estate, but can take no interest in her equitable personal estate, if he survives her. Of real estate, the statutory estate, whether there is or not issue born alive of the marriage, the husband surviving, takes an estate for life, and takes one-half of the personal property absolutely, if the wife dies intestate. The wife may contract with the husband in reference to her equitable estate, and may alien or give to him the same interest as to any other person.—1 Lead. Eq. Cases, 690; *Barker v. Barker*, 32 Ala. 473. Contracts by which the wife aliens, or gives to the husband her statutory estate are prohibited. Code of 1876, § 2709. Without the concurrence of the wife, the husband can not by any contract, not even for necessities create a charge on the equitable separate estate. The statutory estate is charged with liability for necessities, though it is the debt of the husband, and he is the agent in contracting it, and the wife is without capacity by her dissent to avoid the charge. There is manifestly but little analogy between the equitable and statutory estate. The latter is the creation of the statute, and its quality and incidents must be measured and ascertained from the terms of the statute.

We repeat that it is obvious while the purpose of the statute is in some respects to *enable* the wife; its larger sphere and operation is to *disable* the husband. Ability is conferred on the wife to take and hold property, and the husband is disabled by any act of his own, by reduction into possession or otherwise, or by the operation of common law principles, from acquiring title to her property, or property

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accruing to her during coverture. To this extent, the statute *enables* the wife, and *disables* the husband. Dominion over the property; capacity to enjoy it separately from and independently of the husband—the power to dispose of, or to charge it, or personal capacity to contract, is not conferred on the wife, but studiously avoided. The objects of the statute would more often have been defeated than accomplished, if such dominion and capacity had been conferred. The preservation of the property to the wife, whatever may be the faults or misfortunes of the husband, by securing to her the title, and relieving it from liability for his debts, is the scope and operation of the statute. The surest method of preserving it, while conferring on her ability to take and hold, it seemed to the legislature, was, to withhold from her power to dispose of, or to charge it; leaving to the husband as her protector, and trustee, the power to receive, manage and control it, and to take the rents, income and profits. Power to alienate it is conferred on husband and wife, and the mode of alienation is prescribed, thereby negating any other mode.—*Smyth v. Oliver*, 31 Ala. 39; *Whitman v. Abernathy*, 33 Ala. 160; *Alexander v. Saulsbury*, 37 Ala. 375; *Patterson v. Flannagan*, ib. 513; *Warfield v. Ravisies*, 38 Ala. 518. It was said in *Durden v. McWilliams*, 31 Ala. 443, that independent of the statute, the wife had in equity, power to charge her statutory estate. The remark was incidental, and not at all necessary to the decision of any question, the case presented. In the subsequent case of *Cowles v. Morgan*, 34 Ala. 537, the court said that it would not regard itself as trammelled by the remark, when the question should arise. The question did arise, and was carefully considered in *Warfield v. Ravisies*, 38 Ala. 518, and the conclusion reached and announced, was that the wife, “so long as her husband continues her trustee, can not convey or charge her estate, unless she conform to the requirements of the statute.” The suit was in equity to charge the statutory estate, with the payment of a promissory note executed by husband and wife.

If the estate of the wife under the statute bore a closer analogy to an equitable estate—if we could resort to the doctrine of a court of equity in reference to that estate, to guide us in passing on the power of the wife, her capacity to alienate, or by contract to bind the estate in any other mode than by an instrument in writing in which the husband joined, and which was attested or acknowledged as the statute directs, could not be deduced. It is only when her

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power of alienation is not limited or restrained, that she has a general capacity to bind her equitable estate. When alienation is restrained to a particular mode, or confined to particular uses, the mode must be pursued, and the uses observed. We are satisfied in any aspect of the case, the decree of the chancellor is correct, and must be affirmed.

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Bill of Injunction.

1. *The Court of Probate can sell land only for division.*—The Court of Probate has no jurisdiction to sell lands of an estate unless there be heirs or devisees among whom the land can not be equitably divided.

2. *An unborn child is not an heir within the meaning of the statute authorizing a sale of land for partition.*—A child *en ventre sa mere* is not an heir within the meaning of the statute authorizing a sale of the land of an estate for partition among the heirs. A petition, which shows that one heir is alive, and its mother pregnant by the ancestor from whom the inheritance is derived, gives the court no jurisdiction to order a sale for division among the heirs; and the sale will be void, although the child may be afterwards born alive.

3. *An unborn child exists for certain purposes beneficial to it.*—An unborn child is considered as having an existence for certain purposes beneficial to it, but the existence is conditional and imperfect, and confers no right of property until it is born alive.

4. *As a rule the acts of an infant will not operate as an estoppel en pais.* The guardian of infants can not estop them from asserting title to their land sold without authority of law, by an unauthorized receipt of the purchase-money; nor can infants, as a general rule, do any act which will amount to an *estoppel en pais*.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. CHARLES TURNER.

The facts are contained in the opinion.

HARGROVE & LEWIS, and HEWITT & WALKER, for appellants.—1. The appellants were never divested of the title to the land in controversy. It appears from the petition itself that the allegation that the "land could not be equitably divided among the heirs," was unmeaning and nugatory. At the time the petition was filed there was only one heir—as appears from its face—and, therefore, the court could not acquire jurisdiction. The fact that the mother of the heir was pregnant, and that the child, when born, would be a posthumous child of the petitioner's intestate, would not

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have given the court jurisdiction to order the sale. A child *en ventre sa mere* does not become an heir until it is born alive.—1 Shars. Blacks. 208, and notes. Section 1893 of the Revised Code does not change this principle.—2 Barb. 249–52; 4 Paige Chan. 52–3; 3 Barb. Ch. Rep. 509.

2. Sections 2449, 2450 of Code of 1876, say the petition must state the names of the heirs and the places of their residence. It is clear that the proceedings in the Probate Court did not divest the appellants of their title to the land in controversy.

3. The order of the Probate Court is void; the legal title is still in the appellants, and being infants, no act of theirs, or of their guardian, or of the administrator of their father's estate, can estop them from asserting their legal title to the land.—Big. on Estoppel, 486; 38 Ill. 382; 33 Barb. S. C. Reps. 176; 5 Sanf. S. C. Reps. 228. The receipt of the purchase-money of the land by the guardian of the infants, can not divest them of their legal title.—*Whitehead v. Jones*, 56 Ala. 152.

MORGAN, LAPSLEY & NELSON, and TERRY & LANE, for appellees.

STONE, J.—“Lands of an estate may be sold by order of the Probate Court having jurisdiction of the estate, when the estate can not be equitably divided amongst the heirs or devisees.”—Code of 1876, § 2449.

“If, on the hearing of the application, the facts are not proved, the same must be dismissed at the costs of the applicant, for which execution may issue against him and his sureties.”—*Ib.* § 2459.

One of the fundamental conditions—one of the jurisdictional facts—on which this power of the Probate Court can be called into exercise, is, that there are heirs or devisees of the estate, amongst whom the lands can not be *equitably divided*. Division implies two or more claimants or recipients; and its aim and object are, that the property, when divided, shall pass into separate enjoyment. Hence, a petition for a sale of lands, which shows on its face that there is but one heir or devisee, is a nullity, because it presents a case over which the Probate Court has no jurisdiction to decree a sale.—*Pettit v. Pettit*, 32 Ala. 288, and authorities cited.

The legal title to the lands in controversy was in John S. Gillespie, father of the present appellants, at the time of his

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death. At his death he left a widow, Martha S. Gillespie, and one child, James M. Gillespie, then three years old. His wife was then pregnant, and after the order of sale was obtained, under which the lands were sold, was delivered of another child, who still lives, and is named John S. Gillespie. The petition sets forth that the estate is solvent—and “further represents to your honor that the heirs of said deceased are his child, a son named James M. Gillespie, about three years of age—who is a resident of said county, and who lives with his mother, Martha S. Gillespie, the widow of said deceased, who is of full age and a resident of said county, and who is now believed to be pregnant at this time.” The petition then described the lands, containing about 700 acres, and proceeded with the averment that “said lands are of unequal value, and are so situated and are of such dimensions respectively that they can not be equitably divided among said heirs.”

This petition was filed by the administrator of the estate, was addressed to the probate judge of the proper county—the court took jurisdiction of the case, made the proper orders, had proof taken by deposition as in chancery causes—and granted an order to sell the land for division. The administrator proceeded, after advertisement, to sell the land, and Daniel W. Prentice became the purchaser, and obtained possession and a deed to the land. Ejectment was brought by the two heirs of Gillespie above named, to recover possession of the lands, and rents, from the heirs of Prentice. The bill in the present case was filed by the administrator and heirs of Prentice to enjoin the prosecution of said action of ejectment; and the question which meets us at the threshold, is, was the sale, made under said order of the Probate Court, void for want of proper jurisdictional averments?

We have seen above that the petition sets forth only one heir, James M. Gillespie, and the belief that there will be another, then *in ventre sa mere*. Had this unborn child such a legal existence, as that, with the other named heir, it gave the court jurisdiction to order a sale for division between the two?

In *Marsellis v. Thalheimer*, 2 Paige, 35, the court said, “The broad and unqualified language which has been used by some of the judges, has induced the appellant’s counsel to suppose the unborn child was to be considered in existence for every purpose whatever, whether for its own benefit, or that of others. . . . But it must be recollected that the existence of the infant as a real person before birth is a fic-

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tion of law, for the purpose of providing for and protecting the child, in the hope and expectation that it will be born alive, and be capable of enjoying those rights, which are thus preserved for it in anticipation. The rule has been derived from the civil law; . . . although by the civil law of successions, a posthumous child was entitled to the same rights as those born in the life-time of the decedent, it was only on the condition that they were born alive, and under such circumstances that the law presumed they would survive. . . . Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early stage of pregnancy as to be incapable of living, although they be not actually dead at the time of birth, are considered as if they had never been born or conceived."

In *Bowman v. Tallman*, 27 How. Pr. Rep. 212, 272, the court said, "Infants unborn are not seized, hence courts can not sell their interests, because such interests do not exist; they can sell only interests existing."

In *Jenkins v. Freyer*, 4 Paige, 47, 53, it was said that "a child *in ventre sa mere* at the death of the testator is considered as *in esse*, if it is afterwards born alive."

In *Harper v. Archer*, 4 Sm. & Mar. 99, 109, the court said "it is now settled, both in England and in this country, that from the time of conception, the infant is *in esse*, for the purpose of taking any estate which is for his benefit, whether by descent, devise, or under the statute of distribution, provided, however, that the infant be born alive, and after such a period of foetal existence that its continuance in life might be reasonably expected."

In *Mason v. Jones*, 2 Barb. Sup. Ct. 229, 252, the court, speaking of a clause in their statute, in the following language: "Where a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parent," employed the following emphatic words: "Here then is a complete annihilation, in law, of the time that may elapse between the death of a father, and the birth of a previously begotten child. The instant such child is born, it is made to step back to the end of the father's life, there to take its stand, and become clothed with all the rights of property previously conferred."—See also *Howe v. Van Schaick*, 3 Barb. Ch. 488, 508; 1 Shars. Blacks. 130, and note.

From the citations above, it results that although an unborn child is treated as having an existence for certain purposes

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beneficial to it, yet, this existence is conditional and imperfect, and confers no rights of property, until it is born alive. When that event happens, to preserve successions, and to prevent forfeitures, it becomes, by relation and legal fiction, a separate, individual person having personal and property rights, dating back to the time of conception, when such backward step is necessary to protect a descent or devise. If, however, the fœtus is never born alive, then it is treated as if it never had an existence.

Under the facts of this case, we feel compelled to hold that at the time the order of sale was petitioned for and obtained, Mr. Gillespie, the intestate ancestor, had but one heir-at-law—James M. Gillespie; and that the petition was fatally wanting in necessary averments to give the Probate Court jurisdiction. The legal title, then, was not divested by the sale and conveyance, but still remains in the heirs of John S. Gillespie.

It is contended, however, by the appellees—heirs of Prentice—that the Gillespie heirs are estopped from asserting their legal title, by reason that James McAdory, their guardian, received the purchase-money of the lands, and invested it for their benefit.

When the purchase-money was received by the guardian in 1863—the heirs were infants of very tender years; about seven and four years old. They were infants during all this litigation, and one of them is still an infant. The eldest attained his majority during the year 1877. The investment for the alleged benefit of the wards, was an investment of Confederate treasury-notes, in which the collection was made, in Confederate bonds, which perished with the downfall of the Confederate struggle. So, the investment has not benefited the wards, and they do not appear to have had any enjoyment of it. No act of ratification by them is proved; and when their suit was brought, they were infants, incapable of ratifying an unauthorized sale of their lands.

Nor could their guardian estop them, by an unauthorized receipt of the purchase-money of their land, sold without authority of law. To hold the wards estopped by such receipt, would lead to all the mischiefs of private, unauthorized sales of lands held, or controlled in trust, against which our statutes have so sedulously guarded the interests of persons not *sui juris*. Infants, as a rule, can do no act which will amount to an estoppel *en pais*.—Herman, Estop. 237, 313; Bigelow on Estop. 486-7; *Brown v. McCum*, 5 Sandf. Sup. 224; *Schnell v. Chicago*, 38 Ill. 382. See also *Franklin v. Gantt*, 12 Ala. 298.

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The point first above considered is one of purely legal cognizance, and presents no question for equitable interference. The last point is not well taken, and does not furnish the constituents of an estoppel.

Nor is there any thing in the argument based on the clauses of the elder McAdory's will, in which he provided that on a contingency therein named, the Gillespie heirs should forfeit the legacies he gave them. There was no attempt, by the suit for the recovery of the land, to hold the administrator of the Gillespie estate, or the guardian of the minor heirs, accountable for the conduct of their respective trusts.

The decree of the chancellor is reversed—and this court proceeding to render the decree which the chancellor should have rendered, doth order and decree that the bill in this cause be, and the same is hereby dismissed, at the costs of complainants therein, incurred in the court below and in this court; and the injunction therein granted is dissolved.

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An Action to Recover the Purchase-money of Land.

1. *Money paid under a parol contract for the purchase of land may be recovered.*—An action lies to recover money paid under a parol contract for the purchase of land, when the purchaser has not been placed in possession of the land under the contract.

2. *The introduction of superfluous evidence may authorize the admission of irrelevant testimony.*—A plaintiff by the introduction of unnecessary or superfluous evidence, may authorize the defendant to introduce testimony which would otherwise be irrelevant and inadmissible.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

The facts are contained in the opinion.

D. S. TROY, for appellant.—1. Appellant proposed by oral testimony offered and excluded, and also by the record evidence offered and excluded, to show that the credit which was allowed to him in his settlement of the administration of Watson Flinn was on account of the purchase-money due him for the land. This testimony ought to have been

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admitted.—1 Brick. Dig. 809, § 81; 16 Ala. 664; ib. 543-32; ib. 375-36; ib. 525-1.

RICE, JONES & WILEY, for appellee.

BRICKELL, C. J.—The complaint contains two counts—the one for money paid and expended by the plaintiff for the defendant; and the other for money had and received by the defendant belonging to the plaintiff. The evidence of the plaintiff tended to show that the defendant had made sale to her of a tract of land he had previously sold and conveyed to her deceased husband, misrepresenting or concealing the fact, that he had previously conveyed the lands to her said husband. For the purpose of showing, as we suppose, a payment of the purchase-money to the defendant, the plaintiff introduced in evidence, the record of the settlement in the Court of Probate, of the defendant's administration on the estate of her husband. On this settlement, the defendant was allowed as a credit, the sum of \$2,593 69-100, as paid to himself. The statement in the record of the settlement, is in general terms: "by cash paid B. Flinn, \$2,593 69-100," not disclosing on what account it was paid, or on what ground it was claimed or allowed. The defendant having introduced in evidence, the promissory note of the husband, given for the purchase-money of the lands, offered evidence showing that the credit so allowed him, was not on account of the said note, but on account of a liability he as administrator of the deceased husband, was under to himself as administrator of one Bozeman. The Circuit Court on objection made by the plaintiff refused to admit the evidence, and its admissibility is the only question presented for revision.

The relevancy and admissibility of evidence generally depends on the circumstances under which it is offered. A plaintiff by the introduction of unnecessary, or superfluous evidence, may render it proper that evidence should be introduced by the defendant, which would otherwise be irrelevant and inadmissible. The purpose of the action, is the recovery of the money, the plaintiff had paid on a contract for the purchase of lands. If the contract, was verbal, as the evidence seems to indicate, and the plaintiff had not been under it, let into possession, the right of recovery, resulted from the statutory invalidity of the contract.—*Allen v. Booker*, 2 Stew. 21.; *Cope v. Williams*, 4 Ala. 362. On this ground, the plaintiff, by the evidence offered, did not rest her right

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of recovery. The representations of the defendant, that the husband was not the owner of the land, and had not paid for it were shown, and the plaintiff proposed showing further the falsity of these representations. The record of the settlement of the defendant's administration of the husband's estate, showing he had retained from the assets a sum approximating the purchase-money was introduced. This was a fact having a tendency to show the falsity of the representation, that the purchase-money of the land, for which the note of the husband was outstanding, had not been paid; the representation that it was unpaid, having been made subsequent to the settlement. It cast on the defendant the burden of proving, to repel the inference to the contrary, that the sum was retained on some other account, and because of some other demand, than the purchase-money. The act of the plaintiff, rendered necessary and admissible the evidence which was offered.

Nor was the evidence subject to the objection that it was by parol, and contradictory of the record of the settlement. The record of the settlement does not disclose for what particular demand the credit was allowed, and the evidence simply gives application to its general words, which embrace any demand of like amount, for which the defendant had the right to retain.

The judgment is reversed and the cause remanded.

Collins et als. v. Hammock.

Motion to Quash Execution.

1. *Bankruptcy is a personal defence, and must be pleaded.*—Bankruptcy and discharge under it are a personal defence, and if not pleaded in the court trying the case, will be considered as waived.

2. *An objection to a judge on account of interest, must be made at the trial.* An objection to a judge sitting in a case on account of interest, must be made at the time of the trial. It will not be allowed on a motion to quash the execution and vacate the judgment, made several years after it was rendered.

3. *A corporation may make a bond in a judicial proceeding.*—The right to execute a bond in a judicial proceeding, is one of the incidental powers of all corporations that can sue and be sued. And the recitals of the bond in this case show it is the contract of the corporation.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. LEWIS WYETH.

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[Collins v. Hammock.]

The plaintiff, William N. Hammock, brought suit before a justice of the peace, in DeKalb county, to recover damages from the Alabama and Chattanooga Railroad Company for killing a cow. A judgment for the sum of twenty-five dollars was rendered against the defendant on the fourth day of February, 1871. From this judgment the defendant appealed to the Circuit Court, and executed the following appeal bond:

"The State of Alabama, DeKalb county. Know all men by these presents, that we, John C. Stanton, as Superintendent of the Alabama and Chattanooga Railroad Company, Lemuel J. Standifer, Henry C. Haralson, Joseph Hoge and Alfred Collins, are held and firmly bound to William N. Hammock in such sum as may be adjudged against them in the Circuit Court of said county by reason of the said Alabama and Chattanooga Railroad Company taking an appeal from a judgment rendered by A. F. Payne, as a justice of the peace, on the 4th of this instant, in favor of said Wm. N. Hammock, for twenty-five dollars, besides costs of suit against said railroad company, for the true payment of which well and truly to be made, we bind ourselves, our heirs, our executors and administrators, jointly and severally, firmly by these presents. Now, if the said A. & C. R. R. Co. shall well and truly pay all such costs and damages as may be rendered against said company in said Circuit Court then this bond to be void, otherwise to remain in full force and effect. Given under our hands and seals, this 6th day of February, 1871.

"JOHN C. STANTON, [SEAL.]

Sup't of A. & C. R. R. Co.

"LEMUEL J. STANDIFER, [SEAL.]

"ALFRED COLLINS, [SEAL.]

"JOSEPH HOGE. [SEAL.]

"These pleas were filed in the Circuit Court. The defendant pleads the general issue, in short by consent.

"Sept. 22d, 1871.

L. J. STANDIFER,

"Attorney for Defendant.

"The defendant by their attorney pleads in short the bankruptcy of the Alabama and Chattanooga Railroad Company. March 20th, 1873,

"LEMUEL J. STANDIFER, Att'y for Def't."

These pleas, on motion of the plaintiff, were stricken from the file because of informality and insufficiency, and the defendant declining to plead over, a jury was empannelled, and returned a verdict against the defendant and assessed the damages of the plaintiff "at the sum of twenty-five dollars. A judgment for this sum was rendered against the

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defendant, and its sureties on the 18th day of March, 1874. Several executions had been issued on this judgment, and a levy had been made, when, at the spring term, 1875, of the Circuit Court, the defendants, sureties of said railroad company, entered a motion "to quash the levy and several returns of the sheriff upon said *fi. fas.*, and to recall, set aside and hold for naught as to the said movants the said judgment." The grounds assigned were these: "1st. Because the said movants were no parties to said suit, and the supposed appeal bond was not sufficient to authorize said judgment. 2d. Because said defendant made no appeal bond. 3d. Because no appeal was taken by said defendant, and the bond made by said movants was not such as authorized a judgment against them. 4th. Because said judgment as to the movants is void and unauthorized by law. 5th. Because the Hon. W. J. Haralson, the judge who rendered the judgment had been appointed on the 26th day of August, 1872, by the Circuit Court of the United States, receiver of the said defendant and accepted the appointment."

At the spring term, 1877, of the Circuit Court, the motion was overruled, and the defendants excepted.

M. J. TURNLEY, for the appellants.—1. The court erred because the bond purporting to be an appeal bond is the only pretended authority for the jurisdiction of the court, and it is wholly insufficient to authorize or uphold the judgment. The appeal bond shows, upon inspection, that it is not the bond of the said company. It is not signed by the said company, nor by any one for the company. It is signed by John C. Stanton as superintendent of said company. This company is a corporate body, and has a corporate name by which alone it can contract, sue and be sued, as a natural person.—Ang. & Ames, Corp. §§ 99, 103, 110, 217, 223, 276, 283, 295, 315; 1 Redf. on Rail. pp. 59, 617; 1 Pars. Cont. (4 ed.) 117–18–19, and note G.

2. The rendition of a judgment by the Circuit Court against sureties on an appeal bond is a summary proceeding; the power to do it is a special authority conferred by statute in derogation of common law, and it must be strictly pursued. Every fact or requirement of the statute is necessary to its jurisdiction, and must appear on the face of the proceeding. There is no pretence that the company made the bond, or that it was made by any one for the company. It is not good as a statutory appeal bond, and can not justify a summary judgment against the sureties.—Revised Code, §§

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2776, 3257; 27 Ala. 663; 5 Ala. 657; 5 Stew. & Port. 441; 4 Ala. 315; 2 Brick. Dig. p. 464, § 1 *et seq.*

3. If the jurisdiction of the court be wanting, the judgment is void and must be set aside on proper application. 2 Brick. Dig. p. 140, § 137; 40 Ala. 247; 5 Ala. 562.

4. The relief here sought was formerly obtained by a writ of *audita querela*, or *coram vobis* or *coram nobis*; but in modern times and practice the course pursued is by motion in term time, or by a *supersedeas* in vacation.—1 Bouv. Dic. Title *Audita Querela*, 151; *id.* Tit. *Writ of Error*, p. 642; 9 Ala. 150; 12 Ala. 280; *id.* 238; 18 Ala. 778; 39 Ala. 314; 17 Ala. 339; 26 Ala. 413; 16 Ala. 813; 3 Ala. 668; 2 Brick. Dig. p. 466, § 25 *et seq.*

5. It is also insisted that the Hon. W. J. Haralson was incompetent to sit as judge when he rendered the judgment as shown by the record, and that the judgment is therefore void.

L. A. DOBBS, for appellee.—1. The court did not err in its refusal to quash the execution and to vacate the judgment. In doubtful cases the court will not dispose of the case upon motion, but will leave the defendants so to proceed that the plaintiff could demur or bring error.—2 Brick. Dig. p. 465, § 5.

2. Bankruptcy is no defence unless pleaded before rendition of judgment. In this case the defendant had an opportunity to file such a plea, but failed to do so.—1 Smith L. Cases, p. 934, and authorities; 17 Ala. 339. In this case the court says, “if a defendant has had an opportunity and fails to plead his bankruptcy, he is bound by the judgment.”

3. It is not necessary that the appeal bond should be signed by the railroad company.—1 Stew. 266. The bond conforms to section 3257, Revised Code, which is in substance the same as section 9, page 314, Clay’s Digest, under which the decision in 1 Stewart, *supra*, was made.

4. The judge was not disqualified, because he had no direct or immediate interest in the cause.—42 Ala. 349; 45 Ala. 496.

STONE, J.—Bankruptcy, and discharge under it, being in their nature a personal defence, must be pleaded in the court trying the cause; and if not so pleaded, are considered waived, and the judgment is as binding on the bankrupt, as if he had received no discharge.—*Ewing v. Peck & Clark*, 17 Ala. 339.

We consider it unnecessary to decide, in this case, whether

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Judge Haralson had such an interest in the cause as disqualified him from presiding at the trial. No objection, on account of his interest, was raised on the trial; and it is raised, for the first time, on the motion to quash the execution and vacate the judgment, made several years after the judgment was rendered. This, then, is a collateral attack.

In Freeman on Judgments, section 145, it is said: "While it is well settled by the common law, that no judge ought to act where, from interest or from any other cause, he is supposed to be partial to one of the suitors, yet his action in such a case is regarded as an error or irregularity, not affecting his jurisdiction, and [subject] to be corrected by a vacation or reversal of his judgment, except in those inferior tribunals from which no appeal or writ of error lies. If the facts are known to the party recusing, he is bound to make his objection before issue joined, and before the trial is commenced, otherwise he will be deemed to have waived the objections, in cases where the statute does not make the proceedings void." We do not think Judge Haralson's bias, if he had any, was such an interest, "direct and immediate," as to bring the case within our statute.—Code of 1876, § 540; *Ellis v. Smith*, 42 Ala. 349; *Hine v. Hussey*, 45 Ala. 496; *Hayes v. Collier*, 47 Ala. 726; *Newman v. The State*, 49 Ala. 9.

The remaining question relates to the legality of the appeal bond. It is contended that the bond in this case is not the bond of the party applying for the appeal, and that therefore, no judgment could be rendered upon it as a statutory obligation.—Code of 1876, § 3854. The bond is in the following form:

"Know all men by these presents, that we John C. Stanton as superintendent of the Alabama and Chattanooga Railroad Company, Lemuel J. Standifer, Henry C. Haralson, Joseph Hoge, and Alfred Collins, are held and firmly bound unto William N. Hammock in such sum as may be adjudged against them in the Circuit Court of said county by reason of the said Alabama and Chattanooga Railroad Company taking an appeal from a judgment rendered by A. F. Payne as a justice of the peace on the fourth of this instant in favor of said Wm. N. Hammock for twenty-five dollars, besides cost of suit against said railroad company. . . .

"Now, if the said A. & C. R. R. Co. shall well and truly pay all such costs and damages as may be rendered against said company in said Circuit Court, &c.

"(Signed,)

JOHN C. STANTON, Sup't
of A. & C. R. R. Co. [SEAL,]"

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followed by the other names above, with scrolls attached as seals.

In the case of *Drake v. Flewellen*, 33 Ala. 106; *May v. Hewitt*, ib. 161, and in many other cases, collected in 1 Brick. Dig. pp. 60, 61, we considered the *prima facie* intendments of contracts, signed in ambiguous form, such as the present is, and their susceptibility of explanation, on pleadings and proof. In the former case we said, "The note copied in the bill of exceptions imposes, *prima facie*, a personal liability on the defendant. That personal liability, however, can be shifted by pleadings and proof." In *Lazarus v. Sharer*, 2 Ala. 718, this court said, "Where it is doubtful from the face of the contract, whether it was intended to operate as the personal engagement of the party signing it, or to impose an obligation on some third person as his principal, parol evidence is admissible to show the true character of the transaction." In *McWhorter v. Lewis*, 4 Ala. 198, the contract was for the payment of money—"I promise to pay"—and was signed "A. A. Mc. President W. & Coosa R. R. Company." The suit was against McWhorter individually, and he sought to defend on the ground that the note was a debt of the corporation, and not his own personal contract. This court ruled his defence insufficient, because he attempted to make it without a sworn plea; but held that on such verified plea, the defendant could "defend himself against an action charging him personally, by proving that the note was made for and on account of the corporation, in virtue of an authority for that purpose, and so accepted by the payee."

In *May v. Hewitt*, *supra*, the language of this court is, "When it is doubtful from the the face of a contract, *not under seal*, whether it was intended to operate as the personal engagement of the party signing, or, to impose an obligation on some third person as his principal, parol evidence is admissible to show the true character of the transaction." Whether it was the intention of this language to draw a distinction between money obligations under seal, and those not under seal; or whether it was intended to shield sealed instruments of all clases from dangerous exposure to parol proof, we need not inquire in the present case. No attempt was made, or deemed necessary, to explain the character of the bond we are construing. The bond itself, we think, by its recitals, furnishes its own interpretation. It affirms that the appeal was taken by the Alabama and Chattanooga Railroad Company, from a judgment rendered against said corporation; and its condition is to pay "all such costs and damages as

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may be rendered against said company." The right to execute a bond in judicial proceedings, is one of the incidental powers of all corporations that can sue or be sued. The signature of Stanton, was but the signature of the corporation through him—the corporation being incapable of doing a manual act. The authorities we have cited above clearly show that the form and manner of the signature are not conclusive of the question of personal contract *vel non*, and we hold that the recitals in this bond stamp it as the contract of the corporation.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

Collins *et al.* v. Garrett.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. LEWIS WYETH.

With the exception of the names of the parties, the facts are identical with those in the case of *Collins et al. v. Hammock*, *ante*, page 448.

M. J. TURNLEY, for appellants.

TAUL BRADFORD, and L. A. DOBBS, for appellee.

MANNING, J.—Affirmed on authority of *Alfred Collins et al. v. William N. Hammock*, at the present term.

Pruitt v. Ellington.

Trespass.

1. *The distinction between action on the case and trespass is preserved.* The Code preserves the distinction between an action on the case and an action of trespass.

2. *Trespass is the remedy for a tort intentionally committed with force.* If a tort be intentionally committed with force, the immediate consequence of which is injury, trespass is the appropriate remedy; if on the other hand, the injury proceeds from mere negligence, case is the proper action.

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3. *Trespass is not the remedy for an injury caused by negligence.*—Under a count in trespass, evidence of an injury resulting from the negligence of the defendant will not authorize a recovery.

4. *Damages for injury to a growing crop can not always be recovered.* Damages for injury to a growing crop can not be recovered unless it was enclosed by such a fence as the Code requires.

A contract to divide the products of a farm creates a tenancy in common of the products.—A contract of lease which provides that the lessor and lessee of the land, shall divide the products between them, creates a tenancy in common of the products; and they should join in an action to recover damages for injuries done the growing crops.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JAMES Q. SMITH.

Jesse Ellington commenced this action at the spring term, 1876, of the Circuit Court of Lowndes county, against McCormick Pruitt, to recover damages for injuries done by the trespass of the defendant's mules and horses upon the crop of the plaintiff.

On the trial it was proven that the plaintiff was the lessee of the land of the defendant upon which the trespass was committed. "The plaintiff and Artemus Peagler cultivated on shares one part of the said premises, and were equally interested in the crops of corn and cotton grown thereon in 1875; and the plaintiff and Barrister Scott cultivated another part of the said premises on shares, and had equal interest in the crop produced thereon during the year 1875." It also appeared from the evidence that the greatest injury suffered by the trespass of the defendant's stock was done on the crops cultivated by plaintiff and Peagler, and on those of the plaintiff and Scott. The stock of the defendant repeatedly trespassed upon the said premises; and although informed of such trespass, the defendant did nothing to prevent its repetition. It was also shown that "the fences around the premises or enclosures in which the plaintiff's crops were grown were not five feet high, and in many places were not more than three and one-half feet high, and were otherwise insufficient to prevent stock running at large from getting into the fields. The testimony tended to show that all the damage done to the crops was the result of stock running at large; and on several occasions the plaintiff's own stock were found in said fields when the crops were growing." There was evidence showing that "when plaintiff leased said farm from defendant, it was agreed between them that plaintiff was to repair the fence around said farm, and the rent was reduced in consequence of the plaintiff's agreement to make such repairs."

Two witnesses testified "that they were set to watch by

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night, and caught the defendant in the act of pulling down the fence at eleven o'clock at night and letting his stock to trespass."

The court, among other matters, charged the jury "that if they found from the evidence that the plaintiff rented the land upon which it is said the trespass was committed from the defendant for the year 1875, and that the plaintiff, with others, were jointly cultivating a growing crop of corn and cotton; and you find that the defendant was repeatedly informed of the trespass being committed by his stock on the plaintiff's corn and cotton, and you find, after such notice, defendant continued to permit his stock to trespass on plaintiff's corn and cotton, or you find defendant actually took down plaintiff's fence, and let in his stock upon plaintiff's corn and cotton, whereby damage was done, then, in either event, plaintiff is entitled to recover, notwithstanding the statute requiring a fence of a specified description." To this charge the defendant excepted, and asked the court to give the following written charges:

1. "If the proof shows the damage complained of did not occur by some unlawful act of Pruitt, but only by neglect in keeping up his stock, then the plaintiff can not maintain this action, and the verdict must be for the defendant.

2. "That if the only damage to plaintiff resulted from the neglectful allowing Pruitt's mules or horses to go at large, and there was no act of Pruitt, his agents or servants, directing the horses or mules to be put in plaintiff's field, then any damage which resulted from the stock getting into plaintiff's field without the agency of Pruitt can not be recovered in this action.

3. "That unless the plaintiff's enclosure was a fence five feet high, he can not recover for any damage done by Pruitt's mules and horses, unless the stock were put into plaintiff's field by Pruitt, his agents or servants, and that no damage which resulted from the running at large of Pruitt's stock can be recovered in this suit, unless the plaintiff had a lawful fence at the time such damage was done.

4. "That if the evidence shows the corn or cotton to which damage was done, belonged in equal shares to Ellington, the plaintiff, and Peagler, or Ellington and Barrister Scott, then only the damage done to the share of the crop belonging to Jesse Ellington can be recovered in this action, if the plaintiff is entitled to recover at all."

The court refused to give all the foregoing charges, and to such refusal the defendant severally and separately excepted.

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WILLIAM R. HOUGHTON, and WATTS & SONS, for appellant.—1. The Code carefully preserves the distinction between actions of trespass and case. They can not be joined in one action.—42 Ala. 651; 35 Ala. 202. This is an action of trespass.

2. The charge given by the court abolished the distinction between the actions of trespass and case. Damages for permissive negligence (with perhaps the exception of animals known to be vicious), which occur without the agency or concurrence of the master or owner of animals, can not be recovered in this action—trespass.—22 Ala. 629; 49 Ala. 240.

4. The first charge requested by defendant should have been given. It asserts that proof of unlawful force by defendant is necessary to support action of trespass.—22 Ala. 568, 629; 49 Ala. 240. The second charge asserts, defendant was not liable in an action of trespass like this, for acts of his animals done without his knowledge, agency or consent. Authorities *supra*.

5. The third charge asks for the protection afforded the defendant by section 1283 of the Revised Code. The proof shows the fence was not a "lawful fence."—20 Ala. 379; *Dillard v. Webb*, in manuscript. The last charge should have been given. It confined the jury to the point at issue.

CLEMENTS & ENOCHS, and R. M. WILLIAMSON, for appellee.

BRICKELL, C. J.—The distinction between an action on the case, and an action of trespass, is in effect, though not in terms preserved by the Code. For a tort committed with force and intentionally, the immediate consequence of which is injury, trespass is the appropriate remedy. If the injury proceeds from mere negligence, or is not the immediate consequence of the tort, case is the appropriate remedy.—*Bell v. Troy*, 35 Ala. 184. A failure to observe this distinction, is the error pervading the instructions given, and the refusal of instructions by the Circuit Court. Each count of the complaint is in trespass, averring an intentional and forcible injury. Evidence of an injury resulting from the negligence of the defendant in permitting his stock to run at large, though he may have known of their propensity to break the plaintiff's enclosures and trespass on his growing crops, would not authorize a recovery.

It is the right of every owner to permit his cattle and stock to run at large; those who would avoid injuries to their lands from the exercise of this right, must enclose

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against them.—*N. & C. R. R. Co. v. Peacock*, 25 Ala. 229; *M. & O. R. R. Co. v. Williams*, 53 Ala. 595. The statutes with particularity prescribe the character of the enclosure, the owner of lands must provide, to protect himself against the intrusions of cattle or stock running at large; and in express words declare that “if any trespass or damage is done by any animal breaking into lands not inclosed,” as is prescribed, the owner is not liable therefor. Not only is the owner of the animal absolved from liability, but if the owner or occupant of the land injures or destroys such animal, he is liable for five times the amount of such injury.—*R. C. §§ 1282–83*. The third instruction requested by the appellant should consequently have been given, if the form of the action had been adapted to a recovery for a mere consequential injury.

A contract by which the tenant of land lets it to another for cultivation on an agreement for a division of products, creates between them a tenancy in common in the products. *Williams v. Nolens*, 34 Ala. 167; *Strother v. Butler*, 17 Ala. 733. Unity of possession is of the very essence of a tenancy in common.—*Thompson v. Mawhinney*, 17 Ala. 362. In actions for injuries to the possession they should join, not sever.—*Chit. Pl.*; *Austin v. Hall*, 13 Johns. 286. The injury is single, indivisible, and incapable of being split up, into as many separate actions, as there may be tenants. There are causes of action, in which they must, or may sever, and when they do sever, the recovery is graduated to the interest of the tenant suing.

The judgment is reversed, and the cause remanded.

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Damages.

1. *A railroad corporation may commit trespass.*—Railroad corporations may commit trespass.
2. *An action of trespass can not be changed by amendment.*—An action of trespass can not be changed by an amendment of the complaint into a special action on the case.

APPEAL from the Circuit Court of Butler.
Tried before the Hon. JOHN K. HENRY.

[Mobile and Montgomery Railway Co. v. McKellar.]

This action was brought by Alexander McKellar in the Circuit Court of Butler county, against the Mobile and Montgomery Railway Company, to recover damages for killing a cow. The original complaint was in these words:

"The plaintiff claims of the defendant, a corporation under the laws of Alabama, and doing business in the State of Alabama, the sum of two hundred and fifty dollars for wrongfully killing and destroying the following property, viz.: One milch cow, of the value of one hundred dollars.

"The same plaintiff claims of the same defendant the further sum of two hundred and fifty dollars as damages for wrongfully killing and destroying one milch cow, the property of the plaintiff, of the value of one hundred dollars, by running over, against or upon said cow of plaintiff by and with a train of cars and engine attached, belonging to defendant, at, to-wit, in Butler county, on, to-wit, the 15th day of June, 1876, wherefore he brings this suit."

The plaintiff asked leave to amend the first count by inserting the words, "and negligently," before the word killing. To the allowance of this amendment defendant objected, because it would change the form of action, and alter a count in trespass to a count in case. But the court overruled the objection, and the defendant excepted.

The plaintiff also asked leave to amend the second count by adding after 1876, these words: "And plaintiff avers that the killing aforesaid was negligent, or the result of negligence on the part of the corporation, its servants or agents at the time and place aforesaid." To the allowance of this amendment the defendant excepted.

The defendant then demurred on the ground "that the complaint contained one count in trespass and one count in case, which can not be joined in the same action." But the court overruled the demurrer, and the defendant excepted.

As the pleadings present the only question decided, it is unnecessary to state the facts of the case.

HERBERT & BUELL, for appellant.—1. Both counts of the original complaint are in trespass.—1 Chitty's Plead. 127; 35 Ala. 184; Revised Code, p. 677. It may be doubted if the addition of the words, "and negligently," changed its form to case. Such was certainly the effect of the amendment in the second count. Such an amendment is not permissible.—57 Ala. 186; 29 Ala. 623; *McLemore v. Brassell*, Head-note 1876, p. 169.

2. If the amendment did not change the first count from

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trespass to case, then the demurrer to the complaint, as amended, should have been sustained, because it contained one count in trespass and one in case, which can not be joined.—19 Ala. 760; 35 Ala. 184.

GAMBLE & BOLLING, for appellee.—The amendment to the complaint was properly allowed by the court.—53 Ala. 47. Nor was there a misjoinder of counts.—37 Ala. 550; 4 Port. 17.

STONE, J.—We have said that the introduction of steam as a motive power, has wrought some changes in the application of legal principles.—See *Satterfield v. Mobile Trade Company*, and *Tanner v. Louisville and Nashville R. R. Co.* (in manuscript.) Corporations—especially railroad corporations—may commit trespass.—2 Addison on Torts, 720, 1117 to 1123; *Smith v. Birmingham and Staffordshire Gas Light Co.* 1 Adol. & El. 526; 1 Redf. on Railways, 365, 511; *Ormsby v. M. & W. P. R. R. Co.* 37 Ala. 560.

The original complaint in this cause was clearly in trespass.—*Williams v. Ivey*, 37 Ala. 244; *Ragsdale v. Bowles*, 16 Ala. 62; *Sheppard v. Furniss*, 19 Ala. 760. The wrong charged was possibly, direct and immediate, which is the distinguishing characteristic of trespass. The amended complaint charges the injury complained of to the negligence of the corporation and its employees. This makes a special action on the case. It is not permissible, by amendment, to change the form of action.—*McLemore v. Brassell*, at December term, 1876, and authorities cited. We feel compelled to hold that the amendment made was not allowable under our uniform rulings, from which we do not feel at liberty to depart.—*Crimm v. Crawford*, 29 Ala. 623; 1 Brick. Dig. 22, §§ 16, 17, 18.

Judgment of the Circuit Court reversed, and cause remanded.

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Injunction.

1. *The grant of a temporary injunction without requiring a bond, is irregular.*—The grant of a temporary injunction on a bill not verified, and without requiring bond from the complainant, is an irregularity; but it will not cause the reversal of the final decree, if that is supported by the pleadings and proofs.

2. *An attachment levied on property conveyed by a bona fide assignment will be enjoined.*—If an insolvent foreign corporation conveys *bona fide* its lands to an assignee for the equal benefit of its creditors, a court of equity will enjoin the prosecution of an attachment commenced after the assignment, and levied on the property assigned.

3. *An officer of a corporation, whose term of office has expired, may, if no successor be appointed, continue to perform the duties of the office.*—When the duration of an official term is expressed by the charter of a corporation which creates the office, the intention is, that on the expiration of the term, the authority and duty of the officer shall cease; but if the proper corporate authorities neglect to provide a successor, and suffer the officer to continue the discharge of the duties of the office, unless the State or a stockholder objects, no one can complain.

4. *The acts of a board of directors whose term has ended, are valid as to third parties.*—The acts of a board of directors, appointed under the charter to serve until the end of the first Monday in January thereafter, are, after the expiration of the time, valid as to third persons.

5. *When the seal of a corporation is affixed to a deed by the proper officers, the validity of the contract will be presumed.*—When the common seal of a corporation is affixed to a deed, and it is signed by the officers authorized by the charter to sign, or attest its contracts, it will be presumed that the instrument was executed by the authority of the corporation; and those who assail it must show its invalidity.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. ADAM C. FELDER.

The appellant, Sallie G. Thorington, owned a large amount of the bank-bills issued by the Mechanics' Bank, a corporation chartered by the State of Georgia, and doing business in the city of Augusta. To collect the debt due her, she "sued out" a writ of attachment, which was levied on land situated in the county, and State of Alabama, and belonging to the Mechanics' Bank.

Thereupon, William T. Gould filed a bill of complaint in the Chancery Court of Montgomery county on the 26th day of October, 1872, against the appellant. He alleged in his bill that on the fourth day of January, 1866, the Mechanics' Bank had executed and delivered to him a deed of general

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assignment of its property and effects, including the land levied on under the said writ of attachment; and on the same day he accepted the trust and entered upon the discharge of its duties. He "took possession by his agents of the lands, tenements and hereditaments," in the said month of January," "and has ever since remained in possession of the same by his agents and tenants."

The complainant denied that the appellant was a creditor of the Mechanics' Bank, or that she was the sole holder of the bills upon which suit had been commenced; and alleged that the bank-bills had been obtained after the bank had made the assignment to him, and that the appellant had full knowledge of this fact. The complainant prayed that a writ of injunction be issued "to enjoin and restrain all further proceedings on said attachment to subject said real estate to the payment of the demands set up on said attachment suit. And on final hearing, to perpetuate said injunction and remove the cloud created by said attachment to the complainant's title to said real estate."

The bill of complaint was not sworn to; and the chancellor, at the May term, 1873, in granting the prayer for a writ of injunction, overruled the motion of the appellant that the complainant should give bond before the issue of the writ.

In her answer the respondent denied that any person or persons having legal authority from the Mechanics' Bank, or the said bank itself "ever executed and delivered to the complainant a general assignment of its property and effects for the benefit of its creditors, as alleged." The respondent averred that she was the sole owner of the bank-bills upon which she had sued, and denied that they had been transferred to her subsequently to the execution of the said deed of assignment, of which she had "no notice before the institution of the said attachment suit."

The respondent "further" averred "that said pretended deed of assignment was made, executed and delivered by said Mechanics' Bank to said William T. Gould as trustee, and was accepted by him with the intent to hinder, delay and defraud this defendant and the creditors of the said Bank of their just and lawful demands, and that said deed is therefore fraudulent and void."

The respondent denied that the Mechanics' Bank was engaged in "business in the city of Augusta in the year 1866, and that the said alleged deed of assignment was ever executed by said Mechanics' Bank, or by any person or persons in that behalf authorized, and that the same is not the act

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or deed of said corporation; that the said Thomas Metcalf was not the president, and John A. North was not the cashier of the said Mechanics' Bank at the time said deed purports to have been executed, and that they or either of them was not authorized to act for said Bank in that behalf." She also alleged "that the legal and equitable title to said property was still in said Mechanics' Bank, and that said W. T. Gould has no interest in or title to said property or any interest therein."

The charter of the corporation provided that the directors "who shall be chosen at any election shall be capable of serving as directors by virtue of such choice until the end of the first Monday in January next, ensuing the time of such election, and *no longer*; and the said directors at their first meeting after each election, shall choose one of their number as president." The same section of the charter also contained a provision, "that in case it should at any time happen that an election of directors should not be made upon any day when pursuant to this act it ought to have been made, the said corporation shall not for that *cause be deemed to be dissolved*, but it shall be lawful on any other day to hold and make an election of directors, in such manner as shall have been regulated by the rules and by-laws of said corporation."

The evidence showed that the board of directors was elected in 1865, but that no election was held in 1866; and that "the president and other officers" held "over and" discharged "the duties of their respective offices till the date of the assignment." The testimony also tended to show that there was a meeting of the stockholders of the bank in January, 1866, but there was no election of directors; and at that meeting there was an assignment authorized of all the property of the bank to William T. Gould. At that time Thomas S. Metcalf was acting as president, and John A. North as cashier, of the Mechanics' Bank. The defendant moved to dismiss the bill of the complainant for want of equity; but the court overruled the motion.

On the final hearing of the cause, the court decreed that the complainant was entitled "to the relief prayed for in his bill, and that the defendant, Sallie G. Thorington, be and she is hereby perpetually enjoined and forever restrained from further proceedings to subject the lands described in the bill, or any part thereof, to the payment of the debt alleged to be due to her from the Mechanics' Bank of Augusta, in the State of Georgia, or by virtue of the writ of

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attachment, issued out of the Circuit Court of Montgomery county, as stated in the proceedings in this case."

BRAGG & THORINGTON, and WINTER & WINTER, for appellant.—1. It will be observed that the complainant rests the equity of his bill on a single ground, that the attachment creates a cloud upon his title as trustee, &c. The bill seeks no discovery, asks no aid of the court in the execution of his trust, and shows no special ground for equitable interference; but it is an attempt to withdraw the decision of the question of title to the property from the court of law to the court of equity.

2. If the complainant had alleged the prevention of a multiplicity of suits, or a dissolution of the bank, there might have been some pretext for the interference of a court of equity in his behalf, because in that event the validity of the deed might not have been drawn in question in the attachment suit. In levying this attachment the appellant merely pursued the remedy which every creditor has of levying at his peril on any property he claims to be the property of the debtor.—7 Ala. 585; 9 Ala. 363.

3. The court erred in granting the temporary injunction, because the bill of the complainant "had been filed without oath; the defendant had filed her answer, in which she had denied fully and positively all the allegations of the bill, except those relating to attachment suit," &c.

Two depositions of witnesses had been published without prejudice, and it was shown by them that the facts were variant from complainant's bill, and was not entitled to progress further without amending the bill to conform to the proof. The effect of granting this motion was to try the case by piecemeal, and to decree in favor of the complainant on half the testimony, and to assume that the remainder of the testimony would not materially affect the case.

The Code is imperative in its requirement of a bond to be given in all cases of injunction to restrain proceedings at law on a moneyed demand; and the court has no power to relieve the complainant from the operation of the statute.—Code, § 3430.

Independent of authority from the Board of Directors, the president and cashier had no power to execute the deed of assignment. No argument is necessary to support this proposition; a mere citation of authorities is all that can be necessary.—7 Ala. 293-94; 14 Mass. 180; 17 Mass. 97; Ang. & Ames, Corp. p. 313.

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WATTS & TROY, for appellee.—1. There can not be any reasonable doubt of the validity of the deed of assignment. It was authorized by the unanimous vote of the stockholders, and ratified by them after it was made.—Ang. & Ames on Corp. § 98a, § 98; 35 Mo. 13. Directors *de facto* are *prima facie* directors *de jure*.—2 Cranch Cir. Ct. 449, 451; 12 Maine, 205; Ang. & Ames, §§ 280-1-2-3, and 292. The stockholders compose the bank, and the directors, president, cashier, or other officers, are their agents.—Id. § 771.

2. When a deed is made under the seal of a corporative body, it is presumed to be the act of the corporative body. Ang. & Ames, Corp. §§ 224-5. Corporations are bound by the same implications and inferences as natural persons.—1 Brick. Dig. p. 403, §§ 33, 35. Assignments to pay debts by corporations are valid.—7 Ala. 282.

BRICKELL, C. J.—The grant of a temporary injunction, the bill not having been verified, and without requiring bond from the complainant, payable and with condition as the statute requires, was irregular. The irregularity, is not however cause for the reversal of the final decree, if that is supported by the pleadings and proofs. It has worked no injury to the appellants, if the appellee is entitled to the perpetual injunction.

The equity of the bill rests on the well defined jurisdiction, to prevent, as well as to remove clouds on the title to real estate. If under legal process acts are being done, or are in the course of being done, the necessary result of which, will cast a cloud on the title of the true owner, who is in possession, and without adequate legal remedy for their prevention, a court of equity will interfere by injunction to restrain them.—*Burt v. Cassety*, 12 Ala. 734; *Lyon v. Hunt*, 11 Ala. 295; *Martin v. Hewitt*, 44 Ala. 418. The motion to dismiss for want of equity, involved the admission of the truth of all facts well pleaded in the bill. Assuming the truth of these facts, the only result of the levy of the attachment, and a sale under the levy, which it was the purpose of the attachment suit to accomplish, would have been by casting a cloud on the title of the appellee, to have embarrassed him in the exercise of the trusts and powers of the assignment. The *bona fides* of the assignment, and its sufficiency to pass to the appellee, the legal estate in the premises, is not matter of controversy, if its execution was authorized by the proper agencies of the Mechanics' Bank.

The point of controversy is, whether the assignment was

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authorized by the agency of the bank, having capacity to authorize it. It is properly admitted, that in the absence of legislative inhibition, the bank had capacity to make an assignment of its property, for the payment of its creditors. But the appellant insists, under the charter of the bank, the board of directors had exclusive power to make, or to authorize such an assignment. That the assignment to the appellee, was not authorized by a board of directors having any power or authority whatever—that their official term had expired before the execution of the assignment, and the charter prohibited them from exercising the power of directors after the expiration of that term.

The charter of the bank seems to contemplate that all the corporate power conferred, shall be exercised by the board of directors, elected annually by the stockholders. Annual meetings of the stockholders are authorized, but the power which the stockholders can exercise at such meeting, beyond the election of a board of directors, is not defined in express terms. The directors were to be elected *for the well ordering of the affairs of the corporation*, and were capable of serving when elected, *until the end of the first Monday in January, next ensuing the time of such election, and no longer*. To avoid a dissolution, it is provided by the charter, if an election of directors was not made at the time appointed, it should be lawful to make an election at such other time, as might be fixed by the by-laws of the bank. The assignment to the appellee, was authorized by the board of directors, and subsequently ratified by the stockholders, if indeed, the fact is not, that the stockholders requested, and by requesting, authorized the directors to execute it. The evidence leaves it uncertain, whether the stockholders ratified the assignment after it was made, or prior to its execution authorized it. It is not material to the validity of the assignment whether the one fact or the other is true. A ratification would be equivalent to a prior authority. The assignment was executed on the 4th day of January, 1866. It is not a disputed fact that its execution was authorized by the board of directors, and by the board elected and serving for the year 1865. When the authority was conferred, whether in December, 1865, or in January, 1866, after their official term had expired, the evidence leaves in uncertainty and doubt. Perhaps, the just inference is, that during the progress of the war, the assets of the bank had been converted to such an extent, into the securities of the Confederate Government, that on the downfall of that government, the hopeless insol-

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vency of the bank, and its utter inability to continue business, and its corporate existence, was a recognized fact. In view of this fact, a meeting of the stockholders was convened, and determining that it was best to make an assignment of all the corporate property, for the equal benefit of the creditors of the bank, the assignment to the appellee was authorized by the stockholders, and the board of directors elected for 1865. The assignment being authorized and its immediate execution contemplated, there was no necessity for an election of directors for 1866, and none was made. The whole transaction from the meeting of the stockholders, at which the resolution to make an assignment was adopted, until its execution was continuous, only such time elapsing as was necessary for a due consideration of the important step which was being taken, and proper deliberation in the preparation of the assignment. The doubt and uncertainty as to the facts arises from the loss of the minute book, in which the record of the proceedings of the meetings of the stockholders, and of the board of directors, was kept, and the witnesses are testifying, after the lapse of six or seven years from the occurrence of the facts.

It is true, as a general proposition, that the presumptions applicable to individuals, are applicable to corporations. The maxim, *omnia presumuntur rite, et solemniter esse acta, donec probetur in contrarium*, applies to corporations, and corporate action. Charters of incorporation and their acceptance, have been presumed, when the actual corporate existence and action, is a fact of long and undisputed continuance, and the question arises collaterally.—In *Bank of United States v. Dandridge*, 12 Wheaton, 70, it is said, after referring to the presumptions indulged for and against natural persons; “the same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which pre-suppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.” Again, “if officers of the corporation openly exercise a power which pre-supposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.”—In *Angell & Ames on Corporations*, § 224, it is stated: “When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are

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proved, courts are to presume that the officers did not exceed their authority, and the seal is *prima facie* evidence that it was affixed by proper authority. The contrary must be shown by the objecting party. The presumption of authority to affix the common seal, from the fact that it is affixed to the instrument, will not be overcome, in the case of a cashier of a bank, by the mere fact that it is proved that there is no vote of the directors on the subject, since it often happens that the cashier or other officer of a bank exercises a large range of powers, with the tacit approval of his principals, although the nature and extent of his authority has never been defined by any direct act of the corporation." The 8th section of the charter of the bank, expressly provides that all its contracts shall *be signed by the President, and countersigned or attested by the Cashier*. The assignment to the appellee is under the corporate seal, executed by persons executing as such officers in the name of the bank. It was accepted by the appellee, contemporaneously with its execution, and he has since had possession of all the assets conveyed by it, and openly exercised all its powers and duties. Since its execution, the existence of the bank as a corporation has been merely nominal. The premises in controversy have been in the undisturbed possession of the appellee, through his tenants, and publicly offered for sale by his agents. The presumption indulged in favor of the validity of the assignment, from this state of facts, must prevail, and must be overcome by the appellant, if it be conceded that the board of directors alone could have authorized its execution, during the official term for which they were elected. Whatever of doubt and uncertainty may attend the fact, the just presumption arising from this state of facts, resolves in favor of the validity of the assignment,—that it was executed under authority from the corporate agency, having capacity to authorize its execution.

But we can not concede the invalidity of the assignment, if the fact was clearly shown, that its execution was authorized by the board of directors elected for 1865, in January, 1866, after the expiration of their official term, successors to them not having been elected, and they continuing without dissent from the stockholders, or from the State, to exercise the functions and powers of directors. Officers coming rightfully into office, though improperly continuing in office, are generally regarded as officers *de facto*. The acts of officers *de facto*, whether public officers, or the officers of corporations public, or private, are esteemed valid, unless

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invoked for their own protection, the public, or individuals, having rights and interests to be conserved, in all collateral proceedings. All authorities concur in recognizing as an officer *de facto*, a person exercising the powers and duties of the office, under color of an appointment or an election. The definition of such an officer, given by Lord ELLENBOROUGH, in *King v. Bedford Level*, 6 East. 368, this court has accepted and adopted, and it is probably the most accurate and expressive which could be framed. "*An officer de facto, is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.*"—*Heath v. State*, 36 Ala. 273; *Williamson v. Woolf*, 37 Ala. 298. Whenever the duration of an official term, is expressed by the charter of a corporation, which creates the office, the intent is of course, that on the expiration of the term, authority and duty shall cease. Beyond the expiration of that term, the officer is without right to continue in office. And if in opposition to the proper corporate authorities, he claimed an extension of his official term, and a right to exercise the powers, discharge the duties, and take the emoluments of the office, to the exclusion of another, coming into the office, as he came into it originally, there could be no hesitation in pronouncing him a mere usurper, and trespasser. But suppose the proper authorities neglect to provide for a successor to him, and suffer him to continue in office, discharge its duties—or suppose unforeseen contingencies arise, events which can not be traced to human agency, and there can not be an election or appointment of successors, or such an election or appointment is an idle ceremony, and the corporate body suffer the corporate officers, after the expiration of their official term, to proceed in the exercise of their functions, and the discharge of their duties, who can gainsay it? Who has an interest to gainsay it? There can be no adverse interest except in the State, and in the stockholders, and if the State is passive, and the stockholders ratify, who can be heard to complain? Shall a creditor of the corporation to whom all the security, to which he has a moral or equitable right is afforded by the act he denounces as *ultra vires*, be heard to complain? The duty of the corporation, considering the condition to which it was reduced, and without regard to the inquiry whether the appellant was then, or subsequently became, a creditor, was to reduce its assets to money, for the benefit of all creditors. This is the whole scope of the assignment, the validity of which the appellant assails. If there had been, as the appellant insists, there

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ought to have been, an election of directors on the first day of January, 1866, and it was not competent for the directors elected for 1865, to have authorized and assented to such an assignment, after that day, who could complain if the board of directors of 1865, did just what the board of 1866, ought to have done, if they had been duly elected? Too much stress is in argument laid on the phrase in the charter, that the board of directors should be capable of serving until the end of the first Monday in January ensuing their election, *and no longer*. The phrase expresses only the implication which would have followed from defining the duration of the official term of the directors. The term of office being prescribed, the due and lawful exercise of official power, would of course cease with the expiration of the term.—Ang. & Ames on Corp. § 288. The theory and principle underlying the recognition of officers *de facto*, and supporting the validity of their official acts, is, that they are wrongfully in office, exercising power legally appertaining only to the rightful officer, but that their acts within the scope of official authority and duty must for the protection and preservation of the rights and interests of third persons be supported. The corporation being insolvent, a duty resting upon it, in the performance of which all its creditors had an interest, was an appropriation of its assets for their equal benefit. So far as the evidence discloses, no creditor had a superior right to preference in payment. Prudence, a sound morality, and a just regard for legal obligations, required that its assets should be placed in a condition to avoid a race of diligence between its creditors, and the “tearing into fragments,” of the assets, and the dissipation in the costs of litigation which would have followed its insolvency. We can conceive of no reasonable objection to the directors rightfully in office, when the matter of the assignment was under consideration, and the necessity for it was apparent, the continuance of the existence of the bank not being contemplated or possible, after the expiration of their official term, yielding assent to the assignment, the stockholders assenting that they should, and giving them the reputation of rightful officers. The charter does not denounce as void, the acts of directors continuing in office, after the expiration of their official term. On the contrary, it contemplates the occurrence of such a contingency, and provides for it by authority for the election of a rightful board, at such time as the by-laws of the bank should prescribe. It can not be supposed, that it was the legislative contemplation, if the

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contingency occurred, that the bank should remain in a state of suspension, incapable of self-protection, and without authority for the *well ordering of its affairs*, until an election of directors could be had. Whether the directors authorized the assignment before, or after the expiration of their official term, we have no doubt of its validity, and that it passed to the appellee the legal title to the premises in controversy, which it was the duty of the Court of Chancery, to prevent from being clouded by a sale under the levy of the attachment against the bank. Since the submission of this cause, we have been furnished with a copy of the opinion of the Supreme Court of Georgia, rendered in the case of *Milliken v. Steiner*, declaring the validity of the assignment to the appellee. If this cause had been in a condition, in which that decision could have been introduced as evidence, it would have been perhaps our duty to follow it without inquiry or discussion.—*Inge v. Murphy*, 10 Ala. 885; *Sydney v. White*, 12 Ala. 728. We are gratified to have reached the same conclusions, with the court of last resort of the State in which the bank was chartered and located, and the assignment executed.

The decree of the chancellor must be affirmed.

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Action for Damages.

1. *The greatest diligence is required of persons having charge of locomotive engines.*—Persons having control of steamboats and locomotive engines must employ more than ordinary skill and diligence to prevent disasters. They are required to be skilled in their particular departments; but infallibility is not required of them.

2. *The train need not be stopped always because persons are on the track.* The presence of persons on the railroad track does not require them to stop their trains or even check them, unless the circumstances show their approach is not observed, or the person is unable to leave the track.

3. *Persons can not convert railroad tracks into common thoroughfares.* Railroad tracks are not highways for general travel, and persons can not as matter of right convert them into common thoroughfares except at public crossings, and then only for the purpose of crossing with no undue tardiness.

4. *An officer who fails to perform a legal duty is indictable.*—An officer having control of a train of cars, who fails to perform a duty enjoined by statute may be indicted; and any person who suffers an injury which would not have resulted had the statutory duty been performed, has a right of action.

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5. *The provisions of section 1700 of the Code do not apply to human beings.* Section 1700 of the Code contains a special provision as to cattle or stock, but has no reference to human beings. The measure of duty and liability for injury to stock found on the track is so different from what pertains to the safety of intelligent human beings, that a charge by the court applicable to one on a trial for the other, would confuse and mislead the jury.

6. *A conductor of a train may be examined as an expert.*—A person who has acted continuously for more than seven years as a “railroad conductor,” can be examined as an expert, relative to the means of stopping railroad trains.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. JOHN K. HENRY.

This suit was begun by Sarah F. Blakely, as administratrix of George Blakely, in the Circuit Court of Conecuh county, against the Mobile and Montgomery Railway Company, to recover damages for the death of George Blakely, caused by a train of the corporation. The defendant “pleaded in short, by consent, the general issue and contributory negligence, with leave to give in evidence anything that might properly be shown under appropriate pleading, and the same leave was given to plaintiff, to reply any matter as if put in plaintiff’s complaint or replication.”

On the trial it was shown that George Blakely, the husband of the plaintiff, on the day he was killed, was in the town of Evergreen, and was intoxicated. In this condition he set out for home, and walked along the railroad track of the defendant. This was the way usually travelled by persons who went in a northerly direction from Evergreen. The track was so used with the knowledge of the defendant, its servants and agents. Before Blakely got out of the corporate limits of the town he was run over by a passenger train of the defendant going south. From the place he was killed the track was straight for more than one-fourth of a mile. When within this distance the engineer saw two women on the track near the place where Blakely was killed. They left the track. But he did not see Blakely until he was within one hundred and fifty or two hundred yards of him. He was then sitting on the track entirely motionless. As soon as the engineer saw Blakely he sounded the cattle alarm, blew down brakes, which were applied, and reversed the engine, “and did everything that could be done to stop the train, but it was impossible to arrest the train in time to prevent the disaster.” The train was behind its schedule time, and was running on a down grade, at a speed variously estimated at from six to ten or from fifteen to twenty-five miles an hour.

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There was evidence tending to show that north of the northern boundary line of the town a public road crossed the track of the defendant, and was distant from the place where the decedent was killed about three hundred yards. When crossing the public road, the engineer blew the cattle alarm furiously and down brakes, which were instantly applied. There was testimony that tended to prove the engineer, by due diligence, could have seen the deceased sooner than he did. But witnesses testified that he had served an apprenticeship in a machine shop, "and that he had been continuously for eight years an engineer, running trains." He was proven to be a safe and skilful engineer.

The witness Keeler testified that he had been continuously a conductor for over seven years, and as such, it was his business to control trains and manage them, and that from his experience as a conductor, he thought he could tell nearly as well as an engineer when and by what means a train could be stopped, though he had never had any practice or training as an engineer, and had never been one.

Thereupon, defendant asked witness whether or not, in his opinion, it was possible, after the witness heard the cattle alarm, to have stopped the train, running at the speed it then was, in time to have prevented running over Blakely? The plaintiff objected to the question, and the court sustained the objection, and the defendant excepted.

After the court delivered a written charge, it read as a part of the charge, the whole of the case of *Mobile and Ohio Railroad Company v. Williams*, 53 Ala. p. 595. And the defendant excepted severally and separately to each of the following extracts, marked A. B. C. D. E. F.:

"A. Thus the common law of this State would stand independent of statutes. Soon after railroads were constructed and operated in the State, it was found this law was not adequate to the protection of owners of stock who were suffered to let it run at large, and on February 10th, 1852, the General Assembly passed an act entitled "An act to define and regulate the liability of railroad companies."—Pamp. Acts, 1851-2, p. 45. The first section of this statute, now forms section 1406 of the Revised Code, and is clear in its terms fixing on a railroad company a positive liability for any live stock killed or injured by its cars or locomotives.

"B. The subsequent sections related to the mode of proceeding, and are incorporated in the Code as modified or changed by subsequent statutes and forms.—Sections 1407 and 1408. The act of 1852 was construed by this court soon

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after its passage as authorizing the owner to recover on mere proof of ownership, value and injury by the railroad company, its cars or locomotives. Whether any degree of care or diligence would relieve the railroad company from liability was not decided, though the intimation was, it would not.—*N. & C. R. R. v. Peacock, supra.*

“C. On the sixth of February, 1858, the legislature passed an act entitled “An act to regulate and define the duties and liabilities of railroad companies in this State.”—Pamp. Acts, 1857–8, p. 15. The first and second sections of this statute now form section 1399 of the Revised Code, and define the duties of engineers or persons in charge of a locomotive as to giving warning of the approach of a train at particular place, and requiring on perceiving any obstruction in the road, that he should use all the means in his power known to skilful engineers in order to stop the train. It renders the engineer, or person in charge of the train, guilty of a misdemeanor if he fails to observe its provisions, and then declares the railroad company shall be liable for all damages done to persons, stock, or other property, on account of said failure to comply with the requirements of this act, or on account of any negligence whatever on the part of the railroad company or its agents, and in no other case.—*M. & C. R. R. v. Bibb*, 37 Ala. 699, it was said that this latter statute materially modified and repealed some of the provision of the act of 1852, but in what respect there was modification or repeal, was not pointed out.

“D. The act of 1858 was amended by an act passed January the 31st, 1861, so as to strike out the words, *and in no other case*, and insert in lieu thereof, that “whenever any stock or other property is killed or injured by the locomotives or cars of any railroad in this State, and the owner of such stock or property brings suit to recover the value thereof, or the damages thereto, the burden of proof shall be on the railroad company, on trial of said suit, to show that the requirements of this first section of said act have been complied with by the said company, its agents or employees, provided that the proof hereby required shall apply only to the particular place at which the injury was done.”—Pamp. Acts 1861, p. 37. This section of the act of 1861, and the third section of the act of 1858, form section 1401 of Revised Code, which declares a railroad liable for all damages done to persons, stock or other property, resulting from a failure to comply with the requirements of section 1399, *or from any negligence on the part of the company, or its agents*, and that the burden of

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proof is on the company to show a compliance with the requirements of section 1399, at the place where and when the injury was done.

"E. In *N. & D. R. R. v. Comans*, 45 Ala. 437, these various legislative enactments were considered, and the result was declared that the several sections of the Code must be taken and construed as one law. So taken and construed, the act of 1852 (Revised Code, 1406) was so far changed and modified by later statutes, that a railroad company was relieved from absolute liability for injuries to stock, and was subjected to liability only for negligence or a failure to comply with the requirements of the statutes. If the injury occurred at any one of the places where these requirements should have been observed, that when the injury was shown, the burden of proof was on the railroad company to acquit itself of negligence, or if it occurred at one of the specified places, the compliance with the precaution mentioned in the statute.

"F. We concur in this opinion, though there is much said in the argument of the court not in conformity to the views we have expressed as to the rights of an owner of animals to suffer them to go at large, and the liability of those not having inclosed against those who may injure them."

The defendant asked the court to give the following charges, which were in writing:

5. "Although the defendant may not have complied with all the requirements of the statute, still the plaintiff can not for this reason recover, if the jury believe the failure so to comply was not the cause of the accident.

2. "An engineer in charge of a train, though he should see two or three persons standing on the track, three or four hundred yards ahead, if they were not giving any signals, and if there were no indications that would authorize a reasonable man to conclude or suspect that they could not or would not get out of the way, would not be bound to anticipate that they would remain on the track and be run over, if there was opportunity for them to get off; and he would not be bound to reverse his engine or stop his train, until there were some indications that they either could not or would not get out of danger; nor would the engineer be bound to suspect that any drunken person was hidden from his view, behind the persons he saw, unless there was something in the circumstances indicating such facts.

3. "One who should voluntarily drink until drunk, and in that condition go and remain upon a railroad track until run over by a train, would be grossly at fault—and he could

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not recover for such injury, if the company's servants used proper means and ordinary care to see who was on the track, and after discovering him there, was unable, by the application of all proper means and care, to avoid the accident."

This charge was given. But the court refused to give the charges marked 5 and 2; and to each refusal the defendant separately and severally excepted.

HERBERT & BUELL, for appellant.—1. The court fell into error in supposing the liability of a railroad company is precisely the same as to persons and stock, and read to the jury the case of the *Mobile and Ohio R. R. Co. v. Williams*, 53 Ala. 595. This case construes sections 1399, 1401 and 1406. They all relate to injuries to stock, and have no reference to injuries to persons whatever.

2. No law can be found on our statute books that makes railroad companies liable for injuries to persons except section 1401, and this makes them responsible only for injuries "resulting from," as the Code has it, or "occasioned by," as the original act puts it, "failure to comply," &c., or negligence.

3. The charges marked 2 and 5 should have been given. *Tanner v. Louisville and Nashville R. R. Co.* in manuscript.

4. The court read the whole of the case of *Williams*, *supra*, and to the reading of the case as a whole the defendant excepted, because it applied to the killing of stock, and in this action the court erred is clear.—1 Ala. 423; 28 Ala. 83.

5. It is a general rule that giving charges which tend to mislead is not reversible because explanatory charges may be asked; yet, when a court gets so far off the track as to read in a man-case a long opinion in a stock-case, argument and all, how could we ask an explanatory charge? What kind of a charge would have cured the error? It would have savored of contempt to have asked the court to charge: "The court charges you, gentlemen, that the long opinion it has read to you has nothing to do with the case." Of course, the court thought the opinion was applicable, and we could do nothing but except.

The whole theory of the doctrine of contributory negligence is that a plaintiff can not recover for an injury which is more occasioned by, or more a result from his own negligence than from the wrong of the defendant. It never was the intention of the legislature to change this rule.—*Shearm. & Redf. on Neg.* §§ 481, 485, 487, and authorities cited.

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GAMBLE & BOLLING, for appellee.—1. The court did not err in excluding the testimony of the witness, Keeler. He had never run an engine a day; had never worked an engine, and was not a mechanic, but had simply been a conductor of a train for several years. He could not be deemed, in any sense, an engineer, and therefore, as an expert, his evidence was inadmissible.—12 Ala. 648; 21 Ala. 33.

2. The principal questions in this case, however, arise on the instructions of the court to the jury. It is contended that the doctrine settled in the case of the *Mobile and Ohio R. R. Co. v. Williams*, 53 Ala. 585, do not apply to this case, except that the burden of proof is on the plaintiff, both as to the injury and the negligence of the defendant.

3. The question at bar is simply this: Is the railroad company liable for injuries to a person caused by its negligence in failing to comply with the statutory requirements contained in sections 1699 and 1700 of the Code of 1876? An examination of them shows there can be no doubt of the defendant's liability. It is not pretended that the case of *Williams, supra*, is not a correct construction of the statute. Why, then, is it not proper to be read to the jury? We deny, as it is asserted, that the case only applies to suits for injuries to stock.

4. If Blakely, drinking or drunk, sat down on the defendant's road, was he thereby outlawed, and did he forfeit his right to exist? But concede that Blakely was guilty of negligence, this does not defeat the right of the plaintiff to recover. "The rule is, the plaintiff may recover, although by his own negligence he exposed himself to injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him.—*Shearm. & Red. on Neg.* §§ 25, 36, 493, 494; 5 *Sneed* (Tenn.) 524; 1 *Fost. & F.* 361; 56 *Barb.* 39; 38 *Ill.* 482; 48 *ib.* 370; 47 *Penn. St.* 300; 26 *Ind.* 76; 33 *ib.* 542; 38 *Ill.* 424; 55 *ib.* 226; 22 *Ohio St.* 227. The *onus* is on the defendant to show contributory negligence.—3 *Otto*, 291; 15 *Wall.* 401.

STONE, J.—In *Satterfield v. Mobile Trade Company*, at December term, 1876, and in *Tanner v. Louisville and Nashville Railroad Company*, at the present term, we declared that persons in control of steamboats or locomotive engines must employ more than ordinary skill and diligence to prevent disasters. Our language was, "that a common carrier who employs steam as his motive power, must bring to the service that degree of diligence which very careful and prudent men

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take of their own affairs." And in the case of the *South and North Railroad Company v. Sullivan*, during the present term, we said, "if one by his own negligence, put himself in peril, yet, if the party sought to be charged, after discovering the peril, or, after being placed in a condition where, if diligent, he would have discovered the peril in time to avert the catastrophe, fails to exert proper diligence, which, if exerted, would probably prevent the disaster, this is culpable negligence, to which the primary negligence of the plaintiff is remotely contributory." And in *Tanner v. Louisville and Nashville R. R. Co.*, *supra*, we said, "If those in charge of a train, even in the rightful exercise of their skill and diligence, find a person dangerously exposed, although such exposure was brought about by the negligence of such person, the duty of diligence resting on the officers of the train is not in the least diminished on that account. In such case, although they will stand acquitted of all blame in this first stage of the peril, yet, when the peril has become reasonably manifest, so as to create the presumption that it was comprehended, each party must again be diligent to prevent the catastrophe. If the person endangered be negligent at this crisis, and suffer injury which proper care and diligence could have averted, the law affords him no redress. On the other hand, if employing proper care and diligence to escape the danger to which his own previous negligence had contributed proximately to expose him, those in control of the train fail to apply proper skill and diligence to avoid the injury, when such skill and diligence, if promptly resorted to, might have prevented it, this is wanton or reckless negligence, for which the railroad will be held accountable. In such case the negligence of the person injured, which first placed him in jeopardy, becomes remotely contributory to the actual injury sustained, and is no bar to the suit. This rule, however, does not apply, where the manifestation of the peril and the catastrophe are so close in point of time, as to have no room for preventive effort."

The foregoing contains a summary of the duties and liabilities of railroad officers and their principals, on the particular subject we have in hand. "But this, like all other human duties, has its correlative rights and immunities. Infallibility is not exacted of those in charge of this fearful engine of good and of evil. They are required to be prudent and skilled in their particular departments; but they deal with those of their fellow-beings who have attained to years of discretion, as intelligent beings having the sense of dan-

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ger and instinct of self-preservation, common to humanity. They are authorized to predicate of such, that seeing a train approaching in dangerous proximity, they will, if of discreet age, get off the track and place themselves out of harm's way."—*Tanner v. L. & N. Railroad Co.*, *supra*. And they are not required to stop their trains, or even check them, when they discover such persons on the track, unless facts or circumstances tend to show the approach of the train is not observed by the person or persons thus seen on the track, or that they are unable to leave it. Railroad tracks are not highways for general travel, and persons can not, as matter of right, convert them into common thoroughfares for man or beast, except at the public crossings; and there, only for the purpose of crossing, with no undue tardiness.

Human beings are sentient, and have the reasoning faculty; and this is the reason why different rules for railroads are prescribed for the preservation of cattle, and for the safety of human life. As to the former, in addition to sounding the alarm whistle, the brakes must be applied, the train checked, or stopped if need be, to prevent injury; for domestic animals know not the necessity of leaving the track. As to the latter, all that is required, as a rule, is to sound the whistle, so as to give notice of the approaching train. We have shown above that there are cases in which more is required. We need not repeat them.

Certain statutory duties are required of engineers and other persons having the control of the running of a locomotive on a railroad.—Code of 1876, § 1699. Various duties are enjoined by this section. First, he must blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road crossing, or any regular depot or stopping place on such road, and continue to blow such whistle, or ring such bell, at intervals, until he passes such road crossing, and until he reaches such depot or stopping place. He must also blow the whistle or ring the bell immediately before, and at the time of leaving such depot or stopping place. Second, he must give a like signal before entering any curve crossed by a public road on a cut where he can not see at least one-fourth of a mile ahead, and approach and pass such crossing in such cut, at such moderate speed as to prevent accident in the event of an obstruction at the crossing. Third, he must give a like signal on entering into the corporate limits of any town or city, and continue to do so until he has reached his destination, or passed through such town or city; and the same on leaving such town or city. Fourth, he must

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also, on perceiving any obstruction on the track of the road, use all means within his power known to skilful engineers, (such as the application of his brakes, and the reversal of his engines,) in order to stop the train. And the officer having control of the running of a train, who violates any of the above provisions, may be indicted and punished therefor. Code of 1876, § 4256. The foregoing contains all the statutory provisions relating to the conduct of the engineer, or officer having control of a train, that are applicable to the case made by this record. It will be seen that there is but one of the subdivisions—the second—which, in the absence of special circumstances, requires that the speed of the train be moderated. That relates to a “curve crossed by a public road on a cut where [the engineer or officer in control] can not see at least one-fourth of a mile ahead.” To come within this clause, there must be a *curve, crossed by a public road, on a cut*, so that the *crossing* and any *obstruction* upon it can not be seen a *fourth of a mile* ahead.

What are the liabilities resting on the railroad corporation, for a disregard of these rules by the engineer, or officer having control of the train? Section 1700, Code of 1876, gives the general answer to this question. It contains a special provision as to cattle or stock, which has no reference to human beings. With that question we have nothing to do in this case. It was very freely discussed in *M. & O. Railroad Co. v. Williams*, 53 Ala. 595.—See also *South & North Railroad Company v. Jones*, 56 Ala. 507. In the present case we have to deal with the question of an injury to a person—an intelligent human being. The section we are considering declares that the railroad company is liable for all damages resulting from a failure to comply with the requirements of section 1699, *supra*. To come within this section, the damages complained of and claimed must be the *result*, or consequence of the failure to perform the statutory duty. If the dereliction of duty, and the damages or injury be not, to some extent, connected as cause and effect, then the case is not brought within the statute.

In *Satterfield v. Mobile Trade Company*, *supra*, we announced a principle which affects the question in hand in some of its phases. The substance of what we said is, that if there be a failure to perform a duty enjoined by statute, and any one suffers injury which would not have resulted, had the statutory duty been performed, this gives a right of action to the party thus injured.

Several of the rulings of the Circuit Court are not in har-

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mony with what we have declared above. We deem it unnecessary to specify them, further than to remark that the measure of duty and liability for injury to stock found on the track, is so different from that which pertains to the safety of intelligent human beings, that charging the law applicable to one, in a trial for the other, is calculated to confuse and mislead the jury. If there was negligence, or a failure to comply with statutory requirements in the conduct of the train, then the corporation is liable, and only liable, for injury which resulted from such negligence or failure. An indictment would lie for such omission of duty, even though harmless in its results; but no one can maintain an action for damages, unless he has suffered injury, and such injury is the result of such negligence, or breach of duty.

We think the witness Keeler laid a sufficient predicate, and should have been allowed to testify as an expert.—1 Brick. Dig. 877, §§ 1053, 4, 5, 7, 8; *Tullis v. Kidd*, 12 Ala. 648.

Reversed and remanded.

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Promissory Note.

1. *Parol evidence of stipulations, inconsistent with the terms of a note, is inadmissible.*—The makers of a promissory note, payable absolutely at a time certain, can not introduce parol evidence of prior or cotemporaneous stipulations, that are inconsistent with the terms of the note, to defeat a recovery by the payee.

APPEAL from the Circuit Court of Lowndes.
Tried before the Hon. JAMES Q. SMITH.
The facts appear in the opinion.

W. C. GRIFFIN, and DAVID CLOPTON, for appellant.

R. M. WILLIAMSON, and W. H. HOUGHTON, for appellees.

BRICKELL, C. J.—The promissory note, on which the suit is founded, is payable absolutely, at a time certain. Its consideration, is shown to have been the transfer by delivery to the defendants, of the promissory note of a third person,

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held by the plaintiff, for a much larger amount, than the sum expressed in the note, and two others cotemporaneously made, for a like amount, payable at different times. The defendants, against the objection of the plaintiff, were permitted to prove, that at the time of the making of these notes, they had purchased from the person whose note was transferred to them, a tract of land; and the plaintiff verbally agreed, that if they failed to pay for, and hold the land, the notes should not be paid, and failing to pay for, they had lost all said land, except eighty acres. This evidence was not addressed to the consideration of the court, but it was designed to show, and had the effect of showing, a cotemporaneous verbal agreement, which is repugnant to, and contradictory of the terms of the note, and of the intentions of the parties as therein expressed. The note was converted from an absolute, into a conditional promise, and the contingency on which it was to become an operative promise, might occur before, or not until long after the time of payment appointed in it. The admission of the evidence, was an infringement of the rule, that contracts in writing can not be varied or contradicted by parol evidence of prior or cotemporaneous inconsistent or repugnant stipulations.—*West v. Kelley*, 19 Ala. 353; *Litchfield v. Falconer*, 2 Ala. 280.

The transfer to the defendants of the promissory note, was a sufficient consideration for the notes executed by them, though the maker of it, may not have paid, or promised to pay them for it. The transfer clothed them with the legal right to demand and compel payment; and it is shown beside, that the transaction was at his request. On the undisputed legal evidence, the plaintiff was entitled to recover, and the court erred in refusing so to instruct the jury.

The judgment is reversed, and the cause remanded.

STONE, J., not sitting.

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Fraudulent Conveyance.

1. Only the assignee of a voluntary bankrupt can file a bill to set aside a fraudulent conveyance.—When there is no lien on the property of a person who becomes a voluntary bankrupt, his assignee only has authority to insti-

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tute suit for the purpose of annulling and setting aside conveyances made by the bankrupt with the intent to delay, hinder and defraud his creditors.

2. *The assignee is the representative both of the bankrupt and his creditors.* As the representative of the bankrupt the assignee succeeds to all the title and rights of property (except the exemptions), which the bankrupt owned. And as the representative of the creditors of the bankrupt he has all the rights of the creditors to pursue and subject to the payment of the bankrupt's debts, property which he had secreted, or disposed of in fraud of his creditors.

3. *After the discharge of a bankrupt, a creditor without a lien can not set aside a voluntary conveyance made by him.*—After the discharge of a bankrupt his creditor who had no lien upon his property can not file a bill for the purpose of setting aside a voluntary conveyance made by him before his bankruptcy.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. HURIOSCO AUSTILL.

The facts are contained in the opinion.

WATTS & WATTS, for appellant.—1. The complainant was a judgment creditor of Munchus, and his lien was not impaired by the bankruptcy of his debtor.—*Crowe v. Reid*, 57 Ala. 281.

2. If the assignee in bankruptcy ever had any right to the land he failed to enforce it within two years of the bankruptcy, and thereby abandoned his right.—19 Ala. 454; Bankr. Law 1367, § 2.

3. The obligation of Munchus to his sureties existed in 1861, and this obligation to hold them harmless was older than his deed to trustees for the benefit of his daughter, and if the deed was voluntary, it was fraudulent to every existing creditor, and Bolling had the right to file a bill to set aside this fraudulent deed, although he had no judgment. Code, § 3446; 47 Ala. 200.

4. An exception to the statute of limitations must be specially pleaded.—21 Ala. 682. If by the fraudulent concealment of Munchus, his assignee did not discover the fraud until two years had elapsed, that was matter of plea for the defendants.—On demurrer the allegations must be taken as true so far as they are well pleaded.—Story Eq. Pl. § 452; 44 Ala. 611.

HERBERT & BUELL, for appellees.—1. If the complainant be entitled to recover at all, it would only be for the amount he paid and interest. This is nowhere averred in the bill, and therefore the bill lacks certainty in this respect.

2. The complainant is a creditor without a lien upon the lands described in the bill. The question arises whether or not a creditor without a lien can maintain a bill in a State

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court to subject to his claim property fraudulently conveyed by a bankrupt previous to his bankruptcy. The right of the creditor to pursue the property of the debtor after bankruptcy, depends entirely upon his rights at the time of the bankruptcy.—16 Ala. 364; 8 Ala. 194; 8 Ala. 370; *Crowe v. Reid*, 57 Ala. 281.

3. It was the privilege of the complainant to have informed the assignee of the fraud alleged, and to have requested him to have brought suit. On his refusal, an order of the bankrupt court directing the suit to be brought could have been applied for.—9 Bankrupt Reg. 331. Or he could have filed his bill and made the assignee a party.—S. C. 2 Johns. 485. But under the allegations of this bill it can not be maintained.—Bump on Bank. (8 ed.) 520-1-2; 48 Miss. 101-3; B. Reg. 558. The case in 19 Ala. 404 was on a statute materially different from this.—29 Ala. 112; 12 Ala. 664; 10 Ala. 702; 1 Brick. Dig. 228, § 25.

4. The courts of the United States have exclusive jurisdiction of such matters.—3 Otto, 130; Revised Statutes, § 711.

STONE, J.—The present bill was filed in May, 1876, and seeks to subject lands, alleged to have been fraudulently disposed of by Joseph K. Munchus, to the payment of a judgment rendered against said Munchus in 1867, and transferred to Bolling and E. H. Pickens, who had paid the alleged debt as the sureties of said Munchus. The bill fails to aver that execution had been issued and kept alive, on said judgment, and makes a claim against Munchus of a debt without a lien. Pickens had died before this suit was brought—had no personal representative, and no one representing his estate, was made a party to this suit.

If the averments of this bill be true—(and appellant can not controvert their truth)—Bolling and Pickens were equally sureties of Munchus, and, as between themselves, equally bound to pay the debt—did pay it, and took a transfer to themselves. The bill fails to aver the sum paid, and the proportion of the payment made by each of the sureties, and hence we feel bound to construe the bill as averring that Bolling and Pickens paid equally, and took a joint transfer of the judgment. This constituted Pickens, or his personal representative after his death, a necessary party to any suit which seeks to coerce the payment of the judgment.—*Ramsey v. Green*, 18 Ala. 771; *Colbert v. Daniel*, 32 Ala. 314. This error could have been amended in the court below, if the bill otherwise contains equity.—*Colbert v. Daniel*, *supra*;

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1 Brick. Dig. 753, §§ 1692, 1694; *Frowner v. Johnson*, 20 Ala. 477.

The main inquiry in this cause is, the right of complainant to recover, even if his pleadings fully presented the case which the bill seeks to charge?

According to the averments of the bill, the debt of Munchus, for which Bolling and Pickens became his sureties, was contracted in 1861. In 1867 this debt was put in judgment against Munchus; Bolling and Pickens, in consideration of their liability, paid this debt, and in 1868, the judgment was transferred to them. Munchus became a voluntary bankrupt under the act of 1867, and received his discharge in 1871; five years before the present bill was filed. It is not shown whether or not this debt was ever proved against the bankrupt estate. It is averred that in 1873, subsequent to his discharge, Munchus promised to pay this debt, and actually made a partial payment thereon. The gravamen of the bill lies in the allegation that, in 1867, Munchus, who owned the land in controversy, procured the title to be vested in his daughter, Susan V. Munchus, without valuable consideration, and "for the purpose of hindering, delaying and defrauding his creditors." The bill further avers "that the said Joseph K. Munchus failed and neglected to return in his schedule of bankruptcy the said lands, and the assignee in bankruptcy of the said Joseph K. Munchus never took possession of said lands, and never made any disposition thereof, and this complainant avers on his belief and information that said Joseph K. Munchus fraudulently withheld said lands from his said schedule." There is no averment that the assignee was ever requested to assert his claim to said lands, or that he even knew of their existence. In fact, the bill, not only fails to make the assignee a party, but does not inform us who the assignee is.

We are aware that this court, in *Rugely & Harrison v. Robinson*, 19 Ala. 404, entertained a bill filed by creditors of a bankrupt, after his discharge, to subject to the payment of their claim, property of the bankrupt, which he had not surrendered in his schedule of assets, and which the assignee had neither sold nor attempted to recover. That case was distinguishable from this in the following particulars: First, the bill in that case was filed by judgment creditors, who had a lien, at least on the land involved, before the petition in bankruptcy was filed, and which lien the bankrupt law of 1841 did not impair. Under that statute it was declared "that nothing in this act contained shall be con-

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strued to annul, destroy and impair . . . any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively." In the present case the complainant had no lien. Second, in that case, the assignee was made a party defendant. In this case he is not made a party. Third, under that statute, the validity of a bankrupt's discharge could be impeached and set aside in the State courts, for "fraud or wilful concealment by him of his property, or rights of property, . . . contrary to the provisions of" the act. Under the present bankrupt law—Revised Statutes § 5120—the discharge can be impeached and set aside, only in the court which granted it, and on a proceeding instituted "within two years after the date thereof." We may add that, in that case, our predecessors ruled that inasmuch as Rugely & Harrison had obtained a judgment, had execution returned no property found, and then filed their bill to subject equitable assets to its payment, they thus acquired a lien on the personal property of the bankrupt, although their bill was filed after his discharge. It is not our purpose in the present case, to express our approbation of, or dissent from that decision. The bankrupt act of 1841, under which that ruling was made, has long been repealed; and the present bankrupt law is so different from that in many important particulars, that we deem it unnecessary to discuss the principles of that decision.

Under the bankrupt act of 1867—Revised Statutes, § 5044—the deed of the register to the assignee conveyed to, and vested in the latter, "all the estate real and personal of the bankrupt." Under this clause, "The assignee can not take anything more than the bankrupt himself had, in any case, except in the case of a fraudulent conveyance by a bankrupt." In other words, the assignee succeeds to all the title and rights of property, (less the exemptions,) which the bankrupt held. This, as the representative of the bankrupt. And he succeeds to all the rights of the creditors of the bankrupt, to pursue and subject to the payment of the bankrupt's debts, property which he has secreted, or disposed of in fraud of his creditors. This, as the representative of the creditors. Hence, the assignment when made, leaves the bankrupt without property, or rights of property, save the exemptions which the statute secures to him.—Revised Statutes, § 5046. But it does not impair or dissolve liens on the bankrupt's property, lawfully acquired, save as the statute declares it shall have such effect. Only the residuum of title or interest held

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by the bankrupt, in property thus legally encumbered, passes to the assignee. "There is no distinction in the bankrupt law between different kinds of liens. Its provisions apply equally to all liens, of whatever kind, character, or description. The first point to be ascertained is whether there is a valid lien according to the laws of the State where the property is situated. If there is a valid lien under those laws, there can be no claim upon the property under the bankrupt law. If there is a valid lien under those laws, it follows the property into the bankruptcy, and will be there recognized, protected and enforced."—Bump on Bankruptcy, 9th ed. 173; Revised Statutes, § 5075, and notes by Bump. It was under this principle that we held in *Crowe v. Reid*, 57 Ala. 281, that the lien of the creditor was preserved, notwithstanding the bankruptcy of his debtor; and that he could assert that lien in the State court. In this we but affirmed, what the bankrupt law declares, that that portion of a bankrupt's property which is covered by a valid lien, to the extent of such lien, does not pass by the bankruptcy or assignment, and never vests in the assignee. But all other property-rights of the bankrupt do so vest.—Revised Statutes, § 5044, 5046.

The present case may be briefly stated as follows: The title to the land in controversy, so far as the same was owned by Munchus, or subject to his debts, being under no legal lien, vested in his assignee, who alone had the title and right to reduce it to possession, for the benefit of all creditors proving their demands. No steps have ever been taken to divest that right and title out of the assignee. If he has, by waiting more than two years, forfeited, or lost his right to sue and recover this property, the result is, not to revest the title in Munchus. He had long parted with it by a conveyance, valid against him. Not to reinvest in the creditors of Munchus, the right, in their own names, to pursue and subject this property to the payment of their demands. Being without a lien, they could only assert their right through the assignee, who, for wise purposes of equal distribution, was clothed with the sole right and power to sue. And the creditors have no right to complain of this; for, if in due time they had requested the assignee to take steps to bring this property under his administration, he, no doubt, would have done so; and thus the proceeds would have been equitably distributed among all the creditors. If thus notified and requested to institute proceedings to possess himself of such property, some decisions hold that the creditor may then proceed in his own name and right, making the assignee a party defendant.—See

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Bump on Bankruptcy, 9th ed. 526 *et seq.*; *in re Winne*, 4 B. R. 23; *Alenbrook v. Cates*, 5 Tenn. 271; see also *Doe v. Childress*, 21 Wall. 642; *Eyster v. Gaff*, 1 Otto, 521; *Gibson v. Green*, 45 Miss. 209.

We agree with the chancellor that the present bill contains no equity.

Decree affirmed.

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Motion against the Sheriff on his Official Bond.

1. *A sheriff may amend his return.*—A sheriff may, by leave of the court, during the pendency of a motion against him, amend his return, although the amendment, if true, will relieve him from liability.

2. *The interest of a partner may be sold to pay his individual indebtedness.* It is well established in this State that the separate creditor of one partner may take in execution that partner's interest in the tangible property of the partnership; but the purchaser at the sheriff's sale can not take into his exclusive possession the property which still remains subject to the debts of the partnership.

3. *The levy upon a partner's interest in an insolvent partnership may be released.*—A sheriff who has levied on the interest of one partner on the suit of his separate or individual creditor may release the levy, when the partnership is insolvent; and the sale of the partner's interest would have been unproductive of anything to satisfy the execution.

4. *On a motion against the sheriff he may prove the insolvency of the partnership.*—On a motion against the sheriff for his failure to collect the money due on the judgment, it is competent for him to prove the insolvency of the partnership.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN D. CUNNINGHAM.

This was a motion made by John Wilson, in the City Court of Montgomery, against Paul Strobach and the sureties on his official bond, to recover a judgment of seven hundred and ninety-four dollars and costs, for the failure of the said Strobach, as sheriff of Montgomery county, to make the money on an execution issued on a judgment obtained by the plaintiff against B. W. Ramsey, at the February term, 1874, of the City Court of Montgomery.

At the trial, after the plaintiff had read the motion and notice of the motion, Paul Strobach, one of the defendants, moved the court for leave to amend his return on the execution, which was in these words: "Returned for *alias*, July

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15th, 1874, Paul Strobach," by adding the following: "The nine bales of cotton upon which the attachment in the case was levied, was found to be the property of the partnership of Collins & Ramsey, and subject and liable to liens and debts; against the partnership far exceeding their value, the partnership being insolvent. And said cotton was released from the levy. This return is made by leave of the court."

The plaintiff objected to this motion; but the court granted the motion, and the plaintiff excepted. The plaintiff then moved to strike out this part of the amendment: "and subject and liable to liens and debts against the partnership far exceeding their value, the partnership being insolvent." The defendant Strobach objected to the motion; the court sustained the objection, and the plaintiff excepted. The defendant then interposed this plea: "and the said Paul Strobach comes and says that the money due on said execution, nor any part thereof, more than was made, could not, by due diligence, have been made by him, the said Strobach." The plaintiff joined issue, "and proved that Paul Strobach was sheriff of Montgomery county on Oct. 31, 1873, when the attachment in the cause was placed in his hands, and that he had been continuously sheriff from that time till the day of trial, and that William Hall, Horace A. Seelye and Jacob Griel were sureties on his official bond as sheriff, before and during the period." It was shown from the records "that at the February term, 1874, a judgment was rendered in said court in favor of John Wilson against B. W. Ramsey, for the sum of seven hundred and ninety-four dollars, as for the debt and damages of the plaintiff, besides costs of suit; that the judgment was founded on a suit commenced by summons, and that after the same was issued, an ancillary attachment was sued out by the plaintiff" and placed in the hands of the sheriff, who levied the attachment on the 15th day of November, 1873, on thirty-one bales of cotton, as the property of defendant Ramsey, and that afterwards, by order of the plaintiff, the levy was released on twenty-two bales in favor of the landlord's lien. On the 11th day of May, 1874, an execution was regularly issued on the said judgment and placed in the hands of the sheriff. The execution was returnable to the July term of the city court, and the said Strobach, as sheriff, refused and failed to sell the said nine bales of cotton, or the interest of said Ramsey therein.

The defendant Strobach introduced one Collins, who testified that he and the said Ramsey were partners in the busi-

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ness of planting, and they leased a plantation and sub-let the land to negroes; and that the nine bales of cotton were a part of the rent received from them, and had been delivered by the sheriff to Shular, Hartwell & Co., creditors of the firm of Collins & Ramsey, at the request of Collins & Ramsey.

The defendants asked "witness what was the pecuniary condition of the firm of Collins & Ramsey on the first of November, 1873, and since? The plaintiff objected to the question; the objection was overruled, and the plaintiff excepted. The witness answered it was insolvent." The plaintiff moved to exclude this answer, but the court overruled the motion, and the plaintiff excepted.

The defendants asked the court to charge the jury, "that if they believed the evidence they must find for the defendants." The court gave the charge, and the plaintiff excepted.

ARRINGTON & GRAHAM, and WATTS & SONS, for appellant.

1. The sheriff is bound to execute process, except when he is in danger of committing a trespass or incurring a liability. His duty is to execute the writ without speculating about consequences with which he has no concern.—*Abercrombie v. Chandler*, 9 Ala. 625.

He may show in excuse for not levying, that the property does not belong to the defendant, or that the court has no jurisdiction to render the judgment, or that the judgment is void, because by executing the process under such circumstances he would become liable for a trespass.—*Leavitt v. Smith*, 7 Ala. 175; *Watts v. Mason*, 7 Ala. 703; *Abercrombie v. Chandler*, *supra*.

He is not permitted to show in excuse that the debt was paid before execution; nor that the debt has been satisfied by recovery and satisfaction in another case founded on the same cause of action; nor for failure to return an execution that defendant is insolvent; nor can he set-off executions when he has one in favor of, and another against the same person. *Godbold v. Merchants' and Planters' Bank*, 4 Ala. 520; *Governor v. Powell*, 10 Ala. 544; *Hill v. Fitzpatrick*, 6 Ala. 314; *Harris v. Bradford*, 4 Ala. 221; *Brazeal v. Smith* 5 Ala. 207.

The reason is, that in these cases there is no danger of incurring liability by executing the process, and he is not permitted to constitute himself a judge between the parties, or a champion of one or the other. To permit him to do so, would lead to the greatest abuses.—*Crenshaw v. Harrison*, 8 Ala. 243.

In the case at bar he would not have committed a trespass,
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or incurred any liability by executing the process.—*Moore & Co. v. Sample*, 3 Ala. 319.

He thus, without necessity, compelled the creditor to litigate with himself, who had no interest in the litigation, instead of litigating with the partners themselves.

2. The execution creditor is deprived, by this action of the sheriff, of the right which the law gives him to have the property sold, and of purchasing at the sale. Having become a purchaser, he could compel a settlement of the partnership in a court of equity—a forum which has jurisdiction to settle it—and thus have judicially ascertained the interest he had bought.

3. The plea of the defendant was, that the property released from levy was subject to debts of the partnership exceeding its value, the partnership being insolvent. By overruling the demurrer to this plea, the court below took jurisdiction of a question it was incompetent to try. A court of equity alone can settle a partnership. In order to do so, it is necessary to have an account of all the property belonging to the partnership and its value, also an account of the liabilities of the partnership and of the advances by the partners. *Can the release of the sheriff, if a contest is made with him, have the effect of giving jurisdiction to a court of law of settling a partnership?* If so, the legislature should at once provide it with the necessary instrumentalities. The court below, against the objection of the plaintiff, required the jury to undertake the investigation!

4. The charge of the court was erroneous. The plaintiff having shown the levy on property and its value belonging to a partnership of which the defendant in execution was a partner, made out a *prima facie* case, because the law presumes the solvency of the partnership and the equality of the partners.—*Union Bank of Tenn. v. Benham*, 23 Ala. 143. The burden of proof, then, was on the sheriff of showing that the interest of the defendant partner, if offered at public sale, would not have elicited a bid. There was no evidence on this point. The buyer at sheriff's sale having in no case a guaranty that he will acquire anything by his purchase, and the bid, in cases like the present, being purely speculative, how could the court assume that the plaintiff in execution was not damaged by the failure to sell? Yet, such is the effect of the charge.

ELMORE & GUNTER, for appellees.

BRICKELL, C. J.—It is settled by repeated decisions of

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this court, that a sheriff may, by leave of the court, during the pendency of a suit or motion against him, amend his return or process, though the amendment if true, will relieve him from liability.—*Niolin v. Hamner*, 22 Ala. 578; *Governor v. Bancroft*, 16 Ala. 605; *Leavitt v. Smith*, 14 Ala. 279; *Hodges v. Leaird*, 10 Ala. 678. A return of a ministerial officer, is the officer's answer to the mandate of the process, disclosing its execution, or the reason for not executing it. If it is of non-execution, it may properly embrace any legal excuse for the failure.—*Crocker on Sheriffs*, § 45. There was no error in the refusal of the City Court to strike out the part of the amended return, to which objection was made. It was essential to show the excuse, on which the sheriff relied for releasing the cotton, on which the levy of the attachment had been made. The sheriff in the subsequent progress of the cause, rightfully assumed the burthen of proving its truth, and the cause was decided on the effect of the evidence introduced by him.

The decisions of this court, declaring that the separate creditor of any one partner, may take in execution that partner's interest in all the tangible property of the partnership, have stood too long unquestioned, and been too frequently acted on, for us to indulge any inquiry into, or discussion of their correctness.—*Winston v. Ewing*, 1 Ala. 129; *Moore & Co. v. Sample*, 3 Ala. 319; *Andrews v. Keith*, 34 Ala. 722. The purchaser at the sheriff's sale does not acquire an exclusive right to the possession of the partnership property—he becomes a tenant in common with the other partners, and it remains liable to the payment of the partnership debts, and liable to the adjustment of the accounts of the partners between themselves.—*Andrews v. Keith*, *supra*; *Parsons on Part.* 350–358; *Colyer on Part.* 822 *et seq.* All that can be sold, or acquired by the purchaser, is the interest of the copartner, nothing more. That interest is dependent wholly on the state of the partnership affairs, and the sale eventuates in giving the purchaser nothing, if on a settlement of the partnership, the copartner is found without interest.

The statute under which the motion was made is section 3033 of the Revised Code, authorizing a summary remedy against a sheriff and his sureties, “for failing to make the money on an execution, which by due diligence could have been made,” and authorizing a judgment “for the amount of the execution, interest, and ten per centum damages.” The issue found between the parties, was in effect on the truth of the averment that by due diligence, the money could have

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been made on the execution. The plaintiff to support the affirmative of the issue, could offer any relevant evidence showing the defendant had, or was in possession of property subject to the execution, and its value. Or, the value of property which had come to the possession of the sheriff by the levy of the attachment, which he had failed to sell. It was competent for the sheriff to show the defendant had no interest in such property, or the character, extent, and value of the interest he had, if any. *Mason v. Watts*, 7 Ala. 703; *Leavitt v. Smith*, ib. 175. It seems not to have been controverted that the only interest of the defendant in execution, in the cotton, from which it is supposed the money could have been made, was as a member of the firm of Collins & Ramsey. The cotton being the property of that partnership, all that could have been sold by the sheriff was the interest of the defendant as a partner, the extent of which we have stated. It was competent for the sheriff, to show that the partnership was insolvent, and a sale of the cotton, or of the defendant's interest in it, would have been unproductive—that it would have resulted in yielding nothing to satisfy the execution. This was the effect of the evidence the court admitted, and we think properly. It was undisputed, and in the charge given, the court did not err. It is an unsafe practice, and one a sheriff should but seldom pursue, to release property on which he has levied, because he may be satisfied the interest of the defendant, he has authority to sell, is valueless. When there is no adverse claim, and he can not be involved in liability because of the sale or levy, generally he should obey the mandate of the process. In a case like the present, it is only when he clearly shows the interest of which he could make sale, was without *any real value*, that he can justify his failure to make levy or sale. The plaintiff in execution, is entitled to compensation only for the damage actually sustained, and not the speculative damage. It is not to be supposed that he would have purchased property, or an interest in property, having no intrinsic value, with the view of future litigation. If the appellant, the plaintiff in the attachment and execution, controverted the solvency of the partnership, and really believed the defendant had an interest subject to the payment of his debt, the more appropriate remedy, to ascertain that interest was by a bill in equity, which could have been filed without a sale under the execution. And it is probably matter of regret, that the legislature does not confine an individual creditor of a partner, to this remedy.

Let the judgment be affirmed.

[Smith v. Cooper.]

Smith et al. v. Cooper et al.*Ejectment.*

1. *A tenant for life can only convey his interest.*—A deed which in form conveys the fee, if made by a life tenant, transfers all the interest of the grantor, but it does not impair or affect the remainder, “even though the latter be in form contingent.”

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN K. HENRY.

The plaintiffs, Rosanna Smith, James M. Roberts, and others, brought suit against Edna R. Cooper, George M. Craig, and others, defendants, in the Circuit Court of Butler county, to recover the land described in the complaint, as follows: “The south-west quarter of section thirty-one, township ten, and range fifteen.” The defendants pleaded the general issue.

On the trial, the plaintiffs introduced a deed executed by James Craig on the seventh day of February, 1848, for and in consideration of the natural love and affection which he had for his daughter, Esther C. Roberts, the wife of William A. Roberts. By the deed, he conveyed to Esther C. Roberts “the south-west quarter of section thirty-one, township ten, and range fifteen, lying in Butler county, to have and to hold the same to her sole and separate use, benefit and behoof, free from the debts, liabilities and control of her said husband, William A. Roberts, or any future husband she may marry for and during the term of her natural life; and at the death of the said Esther C. Roberts, the said lands . . . shall vest absolutely and forever in such child, or children, as the said Esther shall have born of her body and living at the time of her death, or the heirs of such child, or children, as may at that time be living; and should the said Esther C. die after the death of her husband, William A. Roberts, without child, or children, or the heirs thereof, living at her death, then said property is to vest in and belong to said James Craig, or his legal heirs who are living at the death of the said Esther C., in absolute right forever. But if the said Esther C. die before her said husband, William A. Roberts, and not have a child, or children, or heirs thereof as aforesaid, living at the time of her death, the said property shall vest in the said husband, William A. Roberts, during the remainder of his natural life, and at his death, the said lands

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shall revert to, and belong to the said James Craig, if he be then living, and if he is not then living, to his other legal heirs who may, at the death of the said Roberts, be living," &c.

It was also shown by the plaintiffs that afterward, on the 27th day of March, 1852, the said William C. Roberts and his wife united in the execution of a deed by which, for the consideration of two hundred dollars, they conveyed to the said James Craig "all their right, title and interest in the said land." The deed provided that "the said money should vest in the said Esther C. Roberts and her children the same as said land by said deed did."

A witness for the plaintiffs testified that "he knew the land in controversy, and that the said land was in the possession of, and cultivated by, William A. Roberts in the years 1850-51. At that time, William A. Roberts and his wife, Esther C. Roberts, had one or two children, and Rosanna Smith, one of the plaintiffs in this suit, was the oldest of said children. Esther C. Roberts died in the spring of 1861, and William A. Roberts died in the spring of 1863.

"The defendants, who were legatees of James Craig, went into the possession of the said land in 1860, and have remained in undisturbed possession ever since; that the plaintiffs are all children, and the only living children and heirs, of William A. and Esther C. Roberts." The defendants offered no evidence.

The court charged the jury that "the estate in the lands sued for, conveyed by James Craig and wife to Esther C. Roberts, as evidenced by the said deeds of conveyance, was a contingent remainder, and was subject to be defeated or surrendered by the acts of the said Esther C. Roberts and her husband, William A. Roberts; that the deed of the said William A. Roberts and Esther C. Roberts, his wife, to James Craig, did defeat the said contingent remainder, and vested the fee simple title to said land in James Craig." The court further charged the jury, at the request of the defendants, that "if they believe the evidence they must find for the defendants." To each of the foregoing charges the plaintiffs separately excepted.

The plaintiffs then requested the following charge, which was in writing: "that if from the evidence the jury believe that W. A. and E. C. Roberts went into the possession of the land sued for, under the deed from James Craig, and held and controlled the same until said land was sold back to said Craig, and at the time the said second deed was executed, Rosanna Smith, one of the children of said E. C. Roberts, was living and is still living,

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and that E. C. Roberts died in 1862, that said Rosanna took a vested remainder in said land, subject only to be divided amongst the after-born children of said E. C. Roberts, who should be living at the time of the death of said E. C. Roberts." The court refused to give the charge and the plaintiffs excepted.

GAMBLE & BOLLING, for appellants.—1. The evidence shows that Esther C. Roberts held a particular estate, and possession of the land, and that Rosanna Smith, her oldest child, was born prior to the conveyance back to James Craig of the land in controversy. This made a vested remainder. 2 Washb. R. Prop. 230; Johns. 61; 5 Paige 318; 7 ib. 70.

2. It is an established rule that courts never construe a limitation into an executory devise when it may take effect as a remainder, nor a remainder to be contingent when it can be taken as vested.—6 Cruise Dig. 444, § 11; 4 Term Rep's 488, in note.

WATTS & SONS, for appellees.—1. No vested remainder can be created, unless the estate vests in the remainder-men at the time of making the deed or will. If the title is to vest subsequent to the making of the instrument creating it, the remainder is contingent, not vested.—4 Kent, 226, 230-1; 11 Book Greenl. Cruise, 225; Fearn on Rem. 216-17; Keyes on Realty, § 192-203.

2. The Code went into operation on the 17th day of January, 1853. So that the law in existence before the Code must define the powers of the life-tenant over the contingent remainder. At the common law the contingent remainder may be destroyed by feoffment made by the tenant for life, also by a surrender by the life-tenant of his estate. 11 Bk. Greenl. Cruise, 298-9; but by a bargain and sale, or lease and release by the tenant, the contingent remainder would not be destroyed.—4 Kent, 279. But by section 35, Clay's Dig. 156-7, the deed of bargain and sale, in Alabama, had all the power of a feoffment, with livery of seisin.—See, also, 1 Rice (S. C.) Rep. 466. In 3 Port. 94 the effect of section 35 of Clay's Dig. 156-7 was construed to mean just what we contend for here—that a deed of bargain and sale, under the influence of this statute, was equivalent to a feoffment. Nor is *Sledge v. Horton*, 29 Ala. 478, inconsistent with this view. Therefore the deed of Roberts and wife to James Craig was equivalent to a feoffment, and defeated the contingent remainder in the children of Esther C. Roberts.

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STONE, J.—When Mr. Craig executed the deed of gift to his daughter, Mrs. Roberts, February 7th, 1848, she had no child. The *habendum* of the deed is in the following language: “To have and to hold the said lands and slaves, and to use, possess and enjoy the same to her sole and separate use, benefit and behoof, free from the debts, liabilities and control of her said husband, William A. Roberts, or any future husband she may marry, for and during the term of her natural life: and at the death of said Esther C. [Roberts,] said lands and slaves, together with the natural increase of said slaves, shall vest absolutely and forever in such child or children as the said Esther shall have, born of her body and living at the time of her death, or the heirs of such child or children as may at that time be living.” The deed then gave a life estate to the husband of said Esther, in the event she died, living her husband, “and not have a child or children or heirs thereof living at the time of her death.” At the end of her husband’s life, then surviving her, or, at the end of her life, she surviving him, in either event she leaving no living lineal descendant, the property to revert to Craig, the grantor.

On March 17th, 1852, Mrs. Roberts and her husband—(she then being the mother of one or two children, who are plaintiffs in this action)—for a recited valuable consideration, sold and conveyed “all our right, title and interest in and to said lands” to said James Craig, “to have and to hold the same with all rights thereto belonging, as far as we have any right to convey the same, to the said James Craig and his heirs forever.” The deed contained no express covenants of warranty, and recited that “said money [the purchase-money paid by Craig] to vest in the said Esther C. Roberts and her children, the same as said land by said deed did.”

The present action was brought by the children of said Esther, living at the time of her death, and was instituted after the death of said Esther and her husband. The defence relied on is said reconveyance by the said Esther and her husband to James Craig, under whom the defendants claim.

It may be sufficient for this case to declare that inasmuch as Mrs. Roberts had only a life estate at most, and her husband had only a contingent life estate, their conveyance of all their “right, title and interest,” did not convey, and did not assume to convey the remainder, which the deed secured to such child or children as the said Esther might leave,

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living at her death. The deed can not be construed to convey a larger interest than it professes to convey. But the principles of law repeatedly declared in this court, from which we have no inclination to depart, would authorize the present plaintiffs to recover, if the reconveyance by Roberts and wife had been of the absolute fee.

In the case of *Horton v. Sledge*, 29 Ala. 478, the deed created an estate in fee in the first takers, determinable on a contingency afterwards to happen; and, in that event, over. Like the present deed, its consideration was natural love and affection. In any other aspect, material to this case, the deed there construed is not distinguishable from this. Speaking of that deed, this court said: "If the deed in this case can not operate otherwise, it will be deemed, for the purpose of upholding it, a conveyance under the statute of uses. If it can not operate as a deed of bargain and sale, because its consideration is natural love and affection, it will be deemed a covenant to stand seized, or some other of the conveyances under the statute of uses."

In 4 Kent's Com. marg. 255, is the following language: "Nor do conveyances which derive their operation from the statute of uses, as a bargain and sale, lease and release, and covenant to stand seized, bar contingent remainders, for none of them pass any greater estate than the grantor may lawfully convey."

In the following decisions of this court, it was held that a conveyance which in form conveyed the fee, if made by a life tenant, while it transfers to the purchaser all the interest of the grantor, yet it does not impair or affect the remainder, even though the latter be in form contingent. This court has never sanctioned the opposite doctrine, which rests largely on a dogma of feudal origin, and is not consistent with the genius of our people.—See *Price v. Price*, 23 Ala. 609; *Lych v. Taylor*, 17 Ala. 270; *Jones v. Harkins*, 18 Ala. 489. See also *Lawrence v. Bayard*, 7 Paige, 70; *Doe v. Provoort*, 4 Johns. 60; *Doe v. Perryn*, 3 T. R. 484.

The rulings of the Circuit Court are opposed to these views.

Reversed and remanded.

[Jones v. Brevard.]

Jones, Adm'r v. Brevard et al.*Legacy.*

1. *A court of equity will dispense with an administration, when its only object is to make distribution.*—Courts of equity will dispense with an administration, and decree a distribution of the assets, when it is affirmatively shown that the only office of an administration, if granted, would be to make such distribution.

2. *After the lapse of twenty years, it will be presumed no debts existed against an intestate.*—After the lapse of twenty years, it will be presumed, in the absence of proof to the contrary, that no debts existed against an intestate upon whose estate no administration had been granted.

3. *Courts of equity and law place the same construction on statutes of set-off.* Courts of equity place the same construction upon the statutes of set-off that the courts of law adopt; and in the absence of special equities, the individual debt of an administrator is not available as a set-off to a demand due him in his representative capacity.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

Ephriam A. Brevard, a resident citizen of the State of North Carolina, made a will by which he appointed Alexander F. Brevard and Robert A. Brevard to be his executors, and died. The executors so appointed, duly qualified and assumed the execution of the trust. The testator owned property in the State of Alabama. And "one B. Constantine Jones was appointed by the Probate Court of Montgomery county to be administrator, with the will annexed, of Ephriam A. Brevard, and took upon him the administration, which was ancillary to the administration in North Carolina."

Mrs. Susan Jones, the wife of B. Constantine Jones, was a legatee under the will of Ephriam A. Brevard. She died intestate in 1851, before she had received any part of the legacy bequeathed to her. There is no administration on her estate. Three daughters of Mrs. Susan Jones were living at the time of her death.

The executors, Alexander F. and R. A. Brevard, instituted a suit against B. Constantine Jones and the sureties upon his administration bond, of whom B. Rush Jones was one, and recovered and received about twenty-five thousand dollars. They instructed their attorneys to pay the money so collected to the "Forney heirs," of whom Mrs. Susan Jones

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was one. Two of her daughters have received a part, if not all, of their shares of the said fund. But her eldest daughter, Maria E. Jones, never received any part of it. She was an idiot, and died in 1872. She had no property, and was an object of charity. For her support, and the care and attention necessary for her welfare and protection, Mrs. Frances A. Jones, the wife of B. Rush Jones, expended a large sum of money.

B. Rush Jones was appointed by the Court of Probate of Montgomery county to be administrator of the estate of Maria E. Jones, and qualified, and is now the administrator. In this capacity, he filed a bill of complaint in the Chancery Court of Montgomery against Alexander F. Brevard and Robert A. Brevard, to compel the payment to him of the share of Maria E. Jones in the legacy bequeathed to her mother, Mrs. Susan Jones, by Ephriam A. Brevard. The said defendants, as executors, answered the bill, and demurring to it, assigned the following grounds of demurrer:

"That it appears from the bill that the complainant is indebted to the estate of said E. A. Brevard and to these defendants as executors, in a sum greater than the amount sought to be recovered in this suit.

"And they further demur, because the bill itself shows that the administrator of Mrs. Susan Jones is the only proper party to sue for and recover the legacy given to her in and by the will of Ephriam A. Brevard; and they further demur, because the only right to have any portion of the money paid over which is claimed in said bill, as shown therein, is a direction from these defendants to their solicitors, or one of them, to pay to the Forney heirs, or legatees, the share to which they are entitled, and does not otherwise show any right of his intestate to the money claimed in this bill. And they demur for want of equity in the bill."

On the final hearing of the cause, it was decreed that the complainant was not entitled to relief, and the bill was dismissed.

DAVID CLOPTON, for appellant.—1. The validity of the defence made by the answer depends upon the right of the defendants to set-off, *pro tanto*, an individual debt due by complainant to them as executors of Ephriam A. Brevard, to-wit: the decree against him—against a legacy to which his intestate is entitled under the will of Ephriam Brevard. This can not be done.

2. No cross-bill for this purpose was filed by defendants,

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and a set-off in equity can only be allowed by a cross-bill.—15 Ala. 233, 248.

3. Courts of equity put the same construction on the statutes of set-off as do courts of law.—22 Ala. 583, 586. The debts must be mutual and owing in the same rights. Hence, a personal debt due from an administrator can not be set-off against a debt which, when collected, will be assets of the estate.—Rev. Code, § 2642; 6 Ala. 399, 401; 5 Ala. 345.

4. The defence can not be supported upon the doctrine of presumed payment. This doctrine arises in cases of indebtedness from one in his individual capacity to an estate which he afterwards becomes administrator. But it appears in no other case. The complainant had no right to satisfy the legacy due his intestate by a credit of the amount on the decree against him. This would have been waste.—39 Ala. 286, 293.

5. A regular grant of administration *eo instanti*, invests the personal representative with the legal title to the personal property, and his title to such assets is exclusive.—15 Ala. 100, 164; 9 Ala. 908, 912. When an estate is entirely free from debt, and the distributees do not invoke the action of the Probate Court to separate their interests, a bill will be entertained to give them their respective shares without the expense and delay of an administration.—29 Ala. 278; 18 Ala. 348, 351.

6. The proof shows complainant's intestate was indebted to Mrs. Frances A. Jones about the sum of two thousand dollars for necessities and care and attention. For this her estate is liable.—37 Ala. 496; 24 Ala. 337.

JOHN A. ELMORE, and D. S. TROY, for appellees.—1. The complainant bases his right to recover, on the fact that the defendants have directed their solicitors to pay out this fund in satisfaction of the shares of the Forney heirs, and they recognized the right of the sisters of his intestate to their shares of the legacy given to their mother, but refuse to pay him his intestate's share of that legacy, although her right is the same as her sisters. A party may recognize the right of one person to a fund, and deny the right of another, who claims on the same grounds.

2. The complainant owes the very estate he brings his claim against, a much larger amount than what would belong to his intestate. It is all the same estate and same fund, and he is chargeable with the amount to which his intestate might be entitled.—8 Ala. 27; 9 Ala. 914; 36 Ala. 606; 23 Ala. 544; 25 Ala. 543.

[Jones v. Brevard.]

BRICKELL, C. J.—1. The general rule that distributees or next of kin can maintain no suit at law or in equity, for the mere purposes of collecting and distributing the assets, until letters of administration have been duly granted upon the estate of the deceased, has been accepted in this State, with a material modification. When an estate is entirely free from debt—when it appears affirmatively, that if there was an administrator, the only duty devolving on him, would be distribution, courts of equity will dispense with an administration, and proceed directly at the instance of a distributee, to decree a recovery and distribution of the assets.—*Fretwell v. McLemore*, 52 Ala. 134. The mother of the intestate of the appellant, entitled to a legacy under the will of Ephraim A. Brevard, died intestate, a married woman in 1851, and of her estate there is no administration. If any debts existed against her, and her coverture, with its consequent disability to contract, raises a presumption against the existence of any, the lapse of time would have barred their recovery, at the filing of this bill, twenty-four years after her death. It, therefore, affirmatively appears, that an administration on her estate, for the recovery of her legacy, would have been a useless ceremony, involving only a diminution of the assets by its expenses. The former decisions of this court authorized a suit by the intestate in her life-time, or by her personal representative after her death, for the recovery and distribution of the legacy to her mother. The co-distributees of the mother, would have been necessary parties to the suit, if it had not been consented by the defendants, that they need not be joined as parties.

2. The appellees, foreign executors, are not ordinarily suable in the courts of this State, but they have consented to the suit, and without objection, submitted to the jurisdiction of the court. They have a fund in this State, derived from an administration of assets here, a large part of which has been distributed to legatees resident here. The sisters of the intestate of the appellant have received the shares of this fund, to which as distributees of the estate of their mother, they are entitled; and the object of the bill is the recovery of the share to which the intestate was entitled. The defence against a recovery, is, that the appellees as executors, have a subsisting decree against the appellant individually, for a sum larger than the share of the intestate; and it is insisted that a presumption arises that he has paid to himself as administrator a sufficiency of this sum to

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satisfy the share of his intestate, which it is his duty to collect. The principle invoked is, "that where a debt and credit—a right to demand, and an obligation to pay—co-exist, even for a moment in the same person, the debt is extinguished by presumption of its payment." But there is no right, legal or equitable, in the appellant to demand or receive payment of the decree against himself. That decree is in favor of the appellees, and they alone have the right to demand and receive payment of it. The *obligation* of the appellant to pay, is not to his intestate, or to any of the *cestuis que* trust of the appellees, but to the appellees alone. The presumption does not therefore obtain, the facts on which it is founded do not exist, and there is no room or reason for its application.—*Whitworth v. Oliver*, 39 Ala. 287; *Ragland v. Calhoun*, 36 Ala. 606.

3. Courts of equity put the same construction on the statutes of set-off, which courts of law adopt. If there is not an equity going beyond the statutes, mutual debts only are available as set-offs, and the individual debt of an administrator, is not available as a set-off to a demand due him in his representative capacity.

4. It is not in the present suit a fact of importance whether there are debts existing against the intestate of the appellant or not; though the evidence of their existence found in the record, seems full and satisfactory. The right of the appellant to recover does not depend on that fact, but on the right of his intestate, which is not controverted.

The chancellor erred in dismissing the bill, and the decree must be reversed, and the cause remanded.

STONE, J., not sitting.

Robinson v. Hirschfelder.

Action of Detinue.

1. *Things not in being can not be sold.*—Things not in being can not be the subject of sale, but they may be of an agreement to sell.

2. *A contract to sell is not a sale, if anything remains to be done by the seller.*—A contract is only an agreement to sell, and does not become a sale if any term in which the seller must co-operate, or which imposes a liability or duty on him, remains to be performed.

3. *In a conflict between purchasers the jury must ascertain to whom delivery*

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was made.—When there is a conflict between two purchasers as to whom the delivery of the property was first made, the jury must ascertain the fact according to the evidence; and the court can not assume, as a matter of law, that there had been a sale or delivery to either.

APPEAL from the Circuit Court of Escambia.

Tried before the Hon. P. O. HARPER.

Young S. Hirschfelder commenced an action of detinue in the Circuit Court of Escambia county, against A. J. Robinson, to recover one hundred sticks of hewn timber. The defendant pleaded the general issue.

The plaintiff introduced as evidence a written agreement made on the 27th day of July, 1871, with one J. Q. Hammons. In it the said Hammons contracted to deliver to the plaintiff, at Ferry Pass, near Milton, Florida, on or before the 15th day of November, 1871, "one hundred sticks of hewn, square timber, to average eighty cubic feet, and to class A2 or B1 good, for which the plaintiff advanced to Hammons three hundred dollars, about one-third" of the estimated value of the timber at the price agreed upon.

Plaintiff also introduced evidence tending to show that Hammons went to work under the said contract, and frequently declared that the timber was for the plaintiff, who, during the progress of the work furnished Hammons, under said contract, goods and merchandise, amounting in value to about six hundred and eleven 79-100 dollars.

There was evidence that while the timber was unfurnished Hammons told the plaintiff he could not perform the contract, but that he would deliver him the timber he had. All of it was in Conecuh county; "some of it near Conecuh river, and the rest was in the woods." The plaintiff consented to receive the timber in the condition it was, and at the places it was lying, and sent a "man to mark it in his mark." He did so with the knowledge and consent of Hammons, who pointed out the timber.

The defendant proved that he had made a contract, on the 14th day of August, 1871, with Messrs. J. T. Chesser and J. Q. Hammons, in which they had agreed to deliver, on or before the 15th day of February, 1872, three hundred or more pieces of hewn or square timber to him, or "in his name to E. Whitmire, inspector of timber, at the head of Escambia Bay, or at Ferry Pass, Florida." By the contract, it was agreed that the timber should average one hundred feet, and class B1 good, A2.

There was evidence that Chesser and Hammons entered on the performance of their contract, and that the defendant

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furnished them with provisions, and goods and merchandise, amounting in value to sixteen hundred and seventy-eight 24-100 dollars.

There was conflict in the testimony "as to how much of the timber taken by the sheriff under the writ of seizure was gotten out by Hammons before Chesser went to work with him, and whether, after that time, the timber gotten for Hirschfelder was kept separate from that gotten for Robinson." The timber was not obtained on the land either of Robinson, or Hirschfelder, or Hammons, or Chesser. There was contradictory evidence, also, "as to whether any of the provisions furnished by Robinson were used by Hammons, or Hammons and Chesser, while getting out the timber sued for. The defendant's evidence tended to show that while one hundred and fifty sticks of timber were lying in the woods and at the river, in Conecuh county, some finished and some unfinished, said Hammons, for Chesser and Hammons, sold and delivered the same to defendant, in consideration of the provisions advanced, and that defendant took possession of the same, which included that sued for, and was having it hauled to the river for rafting when this suit began."

The defendant requested the court to give the following charges, which were in writing :

"2. The written contract introduced by plaintiff would not of itself have the effect to vest in the plaintiff the legal title to timber gotten out by Hammons with the intention on his part of delivering it according to the contract, unless Hammons did something more than merely to get it out.

"3. Though you may believe that Hammons made the written contract introduced by the plaintiff, and afterwards went to work under said contract, and was supplied by Hirschfelder with provisions while he was getting out the timber; and though he did get out timber which, at the time he got it out, he intended to deliver to plaintiff, yet, if before he made any delivery to plaintiff, or did anything else besides the getting of it out to vest title in the plaintiff, he sold or conveyed it to the defendant, then the mere fact that Hammons had once intended the timber for plaintiff would not, if that be the only evidence of title in the plaintiff, enable the plaintiff to recover."

The court refused each of the foregoing charges, and to each refusal the defendant severally excepted.

HERBERT & BUELL, for appellant.—1. To charge three we

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invite particular attention, as it states clearly the point on which the case was made to turn. Bearing in mind that the timber was not being gotten out on Hirschfelder's land, we ask a construction of the written contract with Hirschfelder.

2. This contract is, on its face, merely an executory contract; that it would be satisfied by the delivery of any timber complying with the specifications, and that there is nothing whatever in the contract that would have made the loss fall on Hirschfelder if the timber had been accidentally destroyed before its completion, or delivery and acceptance. If this be so, then the two charges refused were not erroneous.

GAMBLE & BOLLING, for appellee.—1. The agreement between Hammons and Hirschfelder, if nothing more, is certainly a mortgage.—1 Hilliard on Mortgages, p. 2; 2 Ala. 555. But we insist this instrument is more than a mortgage, and coupled with the facts in the case, is an absolute sale. This may be denied, because it is said there was no delivery. A sale is valid between parties without a delivery when they so intend and so treat it.—43 Ala. 622; Benj. on Sales, 363, 78-4. And the testimony shows that while Hammons was getting the timber, he repeatedly declared it was Hirschfelder's, and that he proposed to deliver the timber to Hirschfelder in the woods, and that he consented to receive it, and sent a man to whom Hammons pointed out the timber, and it was marked in Hirschfelder's mark.—Authorities, *supra*.

STONE, J.—Things not *in esse*, actual or potential, can not be the subject of sale. They may be the subject of an agreement to sell. "Things not yet existing, which may be sold, are those which are said to have a potential existence, that is, things which are the natural product or expected increase of something already belonging to the vendor." The crop of hay to be grown on his field, the wool to be afterwards clipped from sheep owned at the time, have a potential existence, and may be sold. But a crop to be grown on lands, or wool to be clipped from sheep afterwards to be acquired, have not a potential existence, and can only be the subject of an agreement to sell.—Benjamin on Sales, 63. The title may pass by the one, it does not by the other.

A contract is only an agreement to sell, and does not become a sale, if any term in which the seller must co-operate, or which imposes a liability or duty on him, remains to

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be performed ; such as weighing, measuring, inspecting, and, we may add, transporting the goods to another place, to be there delivered and received. Title does not pass by these executory agreements.—*Carraray v. Wallace*, 2 Ala. 542 ; *Batre v. Simpson*, 4 Ala. 305 ; *Browning v. Hamilton*, 42 Ala. 484 ; *Magee v. Billingslea*, 3 Ala. 679 ; *Kelly v. Upton*, 5 Duer, 336.

The written contracts with Hirschfelder and with Robinson, neither of them, vested title in the purchaser. They were but agreements to sell that which, at the time, had no potential existence ; and a term of the contract—actual delivery at Ferry Pass—remained to be performed by the seller. Detinue could not be maintained on either of these written contracts, without more.

But if the testimony be believed, each of these parties made a subsequent, modified agreement, by which they agreed to receive, and did receive possession of the timber as it lay in the woods. Parting with dominion to another is delivery of a chattel ; and if Hammons agreed to sell presently, and pointed out to the agent of the vendee the timbers in their then state, with a view of surrendering the dominion, and such agent thereupon took control of them, this amounted to a completed sale, notwithstanding the price to be allowed may have been left dependent on some after event. The question is, did Hammons part with dominion over the timber ?

The bill of exceptions informs us that there was a conflict in the testimony, as to which delivery was first ; that to Hirschfelder, or that to Robinson. This is the turning question in the cause, if sale and delivery was made to each. *Qui prior est in tempore, potior est in jure*. In other words, if Hammons sold and delivered to one, he had nothing left to sell or deliver to the other. The testimony on these questions was given orally to the jury. It was for them to determine what were the facts. They were the sole judges of the credibility and weight of the testimony. The court could not find or assume, as matter of law, that there had been a sale or delivery to either. Possibly the jury may have disbelieved that part of the testimony which tends to show a modification of the contracts. This was for them to decide under the solemnity of their oaths. Charge number 2, asked by the defendant, should have been given, because the court could not, as a matter of law, affirm the truth of the oral testimony. That out of the way, the written contract did not justify a recovery. But if the jury believed

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the oral testimony as to the modified agreement, then plaintiff made out a *prima facie* case.—*Abraham v. Carter*, 53 Ala. 8.

The charge No. 3, asked by defendant, should also have been given. It was for the jury to determine which contract was first consummated by delivery.

Reversed and remanded.

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Detinue.

1. *Section 3120 applies only to actions for money.*—Section 3120 of the Code applies only to actions for money, and not to actions for the conversion or detention of personal property.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

Jackson Morgan brought an action of detinue in the Circuit Court of Montgomery against A. J. Haws, to recover “a bay horse, with the value of the use thereof during the detention from the 15th day of April, 1877.” The defendant pleaded the general issue.

On the trial, the only evidence of the value of the horse was that of the plaintiff. He testified that the “horse was worth eighty dollars. The jury returned a verdict in favor of the plaintiff for the horse, and assessed his value at thirty-five dollars.” On a subsequent day of the term the defendant “moved the court to set aside the verdict and dismiss the case from the docket, on the ground of want of jurisdiction on the part of the court, as shown by the verdict in the cause.” The court overruled the motion, and defendant excepted.

WATTS & SONS, for appellant.—1. The question is, whether the judgment rendered is within the jurisdiction of the court. The constitution of 1875, under which this action was brought, declares, “the Circuit Court shall have original jurisdiction in all matters, civil and criminal, within the State, not otherwise excepted in the constitution; but in civil matters only, when the matter or sum in controversy exceeds fifty dollars.”—Art. VI. § 5. Section 26 of the same

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article declares justices of the peace "shall have jurisdiction in all civil cases wherein the amount in controversy does not exceed one hundred dollars." Hence, the legislature has limited their jurisdiction.—Code, § 757. It, as defined by the Code in all suits for the recovery of specific property is limited to and covers all cases "where the *value* does not exceed fifty dollars."

2. The value of the thing sued for must then be the test of jurisdiction. The value assessed by the jury, and not that claimed by the plaintiff, must be the standard. To permit the claim of the plaintiff to determine the jurisdiction, would put it in his power to abrogate the constitution and the law as to the jurisdiction of the court before which the case is tried.—42 Ala. 319; 29 Ala. 28; 30 Ala. 208.

3. Circuit courts have no original jurisdiction, unless the value exceeds fifty dollars, and a judgment rendered by any court beyond its jurisdiction is void.—31 Ala. 682; 21 Ala. 772. The want of jurisdiction is not aided by a plea to the merits, and it is available in the Supreme Court.—2 Brick. Dig. 158, § 21; 28 Ala. 453. The statute which authorizes an affidavit to show that the verdict was less than the amount of the jurisdiction of the court, by reason of remitting, &c., has no reference to any case when the action is for the recovery of a specific article.—33 Ala. —.

4. When there is no jurisdiction in the court below, this court will reverse and render.—2 Brick. Dig. p. 141, § 143, and authorities, *supra*. In this case, the judgment on its face is void for want of jurisdiction.

R. M. WILLIAMSON, for appellee.—1. The only evidence of the value of the horse was that of the defendant in error, who testified that it was worth eighty dollars. The jury returned a verdict for the plaintiff, but from some caprice—beyond the ken of ordinary mortals, they, on their oaths, found that the horse was worth only thirty-five dollars. Of such a verdict the plaintiff might have complained, but on what view of law, fact or morals the defendant could complain, requires an uncommon vision to perceive.

"For optics keen, it needs, I ween,
To see what is not to be seen."

2. The action in this case is one *ex delicto*.—4 Ala. 669. The motion made by the defendant is only authorized in actions on a "moneyed demand."—34 Ala. 416. The defendant complains that he has been injured by the jury in disregarding their duty in fastening upon him a liability for

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thirty-five dollars, instead of eighty dollars, which the evidence showed he was liable for.

. BRICKELL, C. J.—The civil jurisdiction of the Circuit Court, is in the present, as in former constitutions, limited to cases, in which the amount in controversy exceeds fifty dollars. The *amount in controversy*, is the amount claimed by the plaintiff, and not the *amount of the recovery* he may obtain. The recovery may be reduced below the amount claimed without affecting the fact that the latter was really the subject of a *bona fide* claim and of controversy. To prevent the institution of suits founded on money demands, for fictitious amounts with the view of conferring jurisdiction, the statutes from an early day have clothed the circuit courts with power to nonsuit a plaintiff recovering a sum less than fifty dollars, unless he made affidavit that the sum sued for was really due, and the failure to recover it, was prevented by the failure of proof, a plea of the statute of limitations, or other sufficient cause to be judged of by the court.—Clay's Dig. 325, § 75; Code of 1876, § 3120. The statute applies to actions for moneyed demands only, and not to actions for the conversion, or for the detention of personal property. *King v. Parmer*, 34 Ala. 416. The Circuit Court did not err in overruling the motion to dismiss the suit, and its judgment is affirmed.

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An Action for Damages for a Failure to Cancel a Mortgage.

1. *Sections 2222 and 2223 of the Code are highly penal.*—Sections 2222 and 2223 of the Code of 1876, are highly penal, and must be strictly construed. They do not authorize the institution of a suit against the transferee of the mortgage.

2. *When the record shows the plaintiff has no right to recover, an error of the court will not cause a reversal.*—When a complaint contains no substantial cause of action, and shows upon its face that, by no allowable amendment could a judgment be sustained upon it, the errors of the inferior court will not cause a reversal. They are errors without injury.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

This action was brought by John Grooms against Allen

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Hannon, to recover from him two hundred dollars for failing or refusing to cancel a mortgage which had been fully satisfied. The plaintiff executed a mortgage on the first day of September, 1865, to John H. Caffey. The mortgage was duly recorded in the office of the judge of probate of Montgomery county, and was afterwards transferred to the defendant. Subsequently, the defendant received full payment of the amount due on the mortgage, and was requested to cancel the said mortgage; to enter the satisfaction, as repeatedly requested, the defendant refused.

On the trial of the case, the plaintiff offered evidence tending to show, that the defendant was the transferee of the mortgage. This was excluded by the court. The plaintiff excepted, and took a non-suit. He then moved to set aside the non-suit, on the ground that the court erred in excluding evidence which showed the defendant was the transferee of the mortgage. This motion was overruled, and the defendant excepted.

GEO. W. TOWNSEND for appellant.—1. A strict construction of the law would require the action to be brought against the person only who has the power to discharge the mortgage, whether he be mortgagee, assignee, or transferee, or other holder of the mortgage.—2 Jones, Mort. §§ 989, 990; 34 Mo. 518; 30 Mich. 8.

2. The intention of the Legislature is obvious. It is to compel entry of satisfaction, and remove thereby all cloud from the title of the property. It imposed this duty on the person legally capable of making the entry—upon him who has the power “to receive the satisfaction of the amount secured by such mortgage. The appellee is the only person who could rightfully receive payment, and the only person who could discharge the mortgage or “enter satisfaction upon the margin of the record thereof.”

3. The owner of the mortgage, while enjoying his rights under the same, has certain duties to perform. These duties are imposed by the statute, and by his failure to obey it he has incurred the penalty.

LESTER C. SMITH, for appellee.—1. The statute under which this action was brought is highly penal, and must be strictly construed. The penalty is pronounced against the mortgagee, and does not mention the assignee or transferee of the mortgage.—6 Wis. 497; Bish. Cr. Law, § 114. A mortgagee is defined by Bouvier to mean “one to whom a mortgage is

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made." When a word has a particular legal signification, it must, in the absence of other controlling circumstances, be given that meaning when used in a statute.—Bish. Stat. Crime, § 97.

2. It never was the intention of the legislature to inflict this penalty upon the transferee of a mortgage, because he is not embraced in its terms. Other States have statutes on this subject similar to our own; and the Supreme courts of Wisconsin, Minnesota, Missouri and California, have all held that an assignee, or transferee, is not liable for the penalty, unless expressly included in the terms of the statute.

STONE, J.—The statute under which this suit was brought is highly penal.—Code of 1876, §§ 2222–3. The penalty is denounced against the *mortgagee*, who fails to enter satisfaction on the mortgage, under the circumstances shown in the statute. To recover a statutory penalty, the party complaining must bring himself within the letter of the statute; for such statutes are construed strictly.—*Fairly v. Davis*, 6 Ala. 375; *Russell v. Irby*, 14 Ala. 131; *Jones v. Brooks*, 30 Ala. 588; *Connolly v. A. & T. Rivers R. R.* 29 Ala. 373; 2 Brick. Dig. 464, § 6; Authorities on brief of counsel. The statute does not authorize the institution of a suit against the transferee of the mortgage.

The remedy in this case being statutory and penal, and the complaint showing on its face that the action is improperly brought against a person who is in no sense liable, the complaint does not contain a substantial cause of action. Code of 1876, § 3158. Under no allowable amendment or change of pleadings can this action be maintained. A judgment recovered in this suit, would have been arrested or reversed on error. Hence, no matter what rulings the City Court made against the plaintiff below, it was, at most, error without injury. For such error this court will not reverse. 1 Brick. Dig. 780, § 96.

Affirmed.

[Garrett v. Bruner.]

Garrett et al. v. Bruner, Adm'r.*Application for the Sale of Land.*

1. *An application to a court of probate for an order to sell land, is a proceeding in rem.*—An application to a court of probate for an order to sell land of a decedent for the payment of debts, when collaterally assailed, is regarded as a proceeding *in rem*, and jurisdiction of the thing, not of persons, is the controlling element of its validity. But when the regularity of the proceeding is presented on error, or by appeal, it is regarded as *in personam*.

2. *The necessity of the sale must be proven by the personal representative.* The burden of proof of the necessity for the sale of land rests on the personal representative, whether there is a contest of the application or not; and this fact he must show by depositions. But the contestant may, by oral evidence, controvert the facts stated in the application.

APPEAL from the Probate Court of Lowndes.

Tried before the Hon. J. V. McDUFFIE.

J. E. Bruner, administrator "*cum testamento annexo*" of Charity Garrett, applied to the Court of Probate of Lowndes county for an order to sell the land, described in the petition, for the purpose of paying the debts of the testatrix. The administrator alleged in his petition that he had received no personal property, and knew of none that belonged to the decedent; and that a claim of nearly five hundred dollars had been presented to him in favor of one E. Y. Daniel.

The appellants, M. E. Garrett, William J. Garrett, and other heirs, denied the allegations of the petition in the following manner, viz.: "M. E. Garrett and other heirs-at-law of the estate of Charity Garrett, deceased, by their attorneys, come and deny the allegations of the foregoing petition, and aver that the same are untrue."

On the hearing of the application, the administrator, with other evidence, introduced the following deposition of E. Y. Daniel: "To second interrogatory, he saith, 'W. J. Garrett signed said note, and the name of Charity Garrett was signed to said note by her daughter, in her presence, and at the request of Charity Garrett. I was present when said note was signed and made. Mrs. Charity Garrett told her daughter, in my presence, to sign her name to the note, and it was thereupon done by her. After her name was thus signed to the note, Charity Garrett, I think, made the mark that is on the note between her Christian and surname; or at all events

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she directed her daughter to sign her name to the note, and it was done by her daughter in her presence and in mine.'"

To the introduction of this deposition, the contestants objected, and moved the court to strike out and suppress all of the answer to the second interrogatory, "on the ground that the witness therein detailed a transaction with, or statement by, the decedent—the witness being a party interested to the proceeding." The motion was overruled by the court, and the contestants excepted. The interrogatories propounded by the administrator to E. Y. Daniel were crossed by the contestants, and no objection was then made to his examination on the ground of incompetency.

The contestants introduced the depositions of Ellen Garrett, the daughter of Charity Garrett. She testified that "she never saw the note for \$480 as purporting to be signed by W. J. Garrett and Charity Garrett, until the week before she made her deposition; that Charity Garrett could not write, and did not know a letter; she lived with her, and did not write the name of Charity Garrett to said note; that she was the only daughter of Charity Garrett with her at the date of said note; but another daughter was on a visit to Hayneville, where her mother resided in the winter of 1871, and she never knew said E. Y. Daniel to come to her mother's house in reference to said note." The contestants offered to prove orally, by two witnesses, in whose handwriting the name Charity Garrett appears to said note, and that it is not in the handwriting of Ellen Garrett." The court refused to hear the evidence, and the contestants excepted.

No evidence was offered tending to show "any indebtedness of the estate, except the \$480 note payable to said E. Y. Daniel," and the costs of administration.

The court ordered the land to be sold in accordance with the prayer of the petition. To this action of the court, the contestants excepted.

DAVID CLOPTON, for appellants.

CLEMENTS & ENOCHS, and WATTS & SONS, for appellees.

1. The deposition of Daniel having been taken on direct and cross-interrogatories, without objection as to the competency of the witness, or to any interrogatory, the objection on the trial was too late. The failure to make objection when the interrogatories were filed, was a waiver.—1 Brick. Dig 558, § 121; 30 Ala. 562.

2. The statute requires the evidence to be taken by depo-

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sition.—Code, § 2228. There was, therefore, no authority to receive oral testimony. This court will not presume the Court of Probate has committed error. It must be clearly shown by the record.

3. The bill of exceptions must be construed most strongly against appellants. This offer to prove the handwriting of Ellen Garrett was properly refused, even if such proof were admissible, because it was not shown that the witnesses knew her handwriting; and they were not competent to express an opinion as to whose handwriting the signature of Charity Garrett appears to be in.—12 Ala. 648; 6 Ala. 212.

4. It was not shown that the name Charity Garrett had been written by Ellen Garrett. The whole offer was then irrelevant and illegal, even if oral testimony was competent and legal on such an issue. If there was any good reason for refusing to permit their witnesses to testify, this court will not reverse.

BRICKELL, C. J.—1. An application to a court of probate for an order to sell lands of a deceased person for the payment of debts, made by the personal representative, when collaterally assailed, is regarded as a proceeding *in rem*, and jurisdiction of the thing, not of persons, is the controlling element of its validity. But when the regularity of the proceeding is presented on error, or by appeal, it is regarded as *in personam*. In form it is strictly a proceeding *inter partes*, the personal representative standing as plaintiff, and the heirs or devisees, as defendants. These are the only parties—the creditors who may have claimed, are not parties or privies—the decree rendered is not binding on them; neither establishes the validity, or invalidity of the claims. At common law they would be competent witnesses in the proceeding, not having an immediate interest in its result, and the decree not operating as evidence for, or against them. The statute now removes all objection to the competency of witnesses, except that in suits or proceedings by or against executors or administrators, a party is not allowed against the objection of his adversary to testify to any statement by, or transaction with, the deceased person whose estate is interested.—Code of 1876, § 3058. The objection to the competency of Daniel as a witness, testifying to transactions with, or statements made by the intestate, was not well taken. He was not a party to the proceeding, and of consequence not within the statutory exclusion.

2. An application for the sale of lands may be contested

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by any party interested.—Code of 1876, § 2453. The burden of proof of the necessity for the sale, (the insufficiency of the personal property for the payment of debts), rests on the personal representative, whether there is a contest of the application or not, and it is evidence of this fact which he must show by depositions. Proof by depositions is limited to this fact, and to the evidence of it, which he must offer of necessity. On the contest when it arises, the contestants may by oral evidence controvert the facts stated in the application. The general law is, that “all testimony, except as otherwise directed, must be given in open court on the oath or affirmation of the witness.”—Code of 1876, § 3057. The court erred in excluding the evidence offered by the contestants, tending to show that the name of the intestate as it appears signed to the note payable to Daniel, was not in the handwriting of Ellen Garrett, and showing in whose handwriting was the signature. It was not a controverted fact, that the intestate had not in person signed the note. Its genuineness and validity as a debt against her, depended on the facts proved by Daniel, that she had authorized Ellen Garrett to sign the note, and that after the signature by Ellen, the intestate had affixed her mark. These facts were disproved by Ellen, and it was competent to corroborate her by evidence, that the signature was not in her handwriting, and by evidence showing in whose handwriting it was in fact. If the evidence had been admitted, the existence of a debt would not have been sufficiently proved, and a decree of sale should not have been rendered.

Reversed and remanded.

STONE, J., not sitting.

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Action of Assumpsit.

1. *A tombstone suitable to the value of decedent's estate is a proper charge.* A marble slab placed over the intestate's grave, if its cost be in accordance with the value of his estate, and with what was his condition in life, is a proper charge against the assets in the hands of the administrator.

2. *If the estate be declared insolvent, the claim must be verified and filed.* But when the estate is legally declared insolvent, the account must be verified and filed against the estate in the same manner as other claims are

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filed. Under the general policy of our system of insolvency, preferred claims, as well as those not preferred, must be alike verified and filed.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

Joseph Curbow and Lyman A. Hitchcock, as executors of the will of H. W. Hitchcock, deceased, brought suit against William T. Hatchett, to recover the value of a marble slab placed over the grave of William H. Ogbourne. The defendant pleaded, in short, by consent :

“ 1. General issue.

“ 2. That the estate of the said William H. Ogbourne, was, on the 26th day of December, 1874, reported by this defendant, who was then the administrator thereof, insolvent, to the Probate Court of Montgomery county, which Probate Court had jurisdiction of the said estate, and that on the second day of February, 1875, said report was duly heard and considered by said Probate Court, and said estate duly declared insolvent, and an order made for this defendant, as administrator, to file and settle his accounts as such administrator was duly heard, allowed and passed by said court, and the creditors of said estate failing to elect any administrator *de bonis non* on such insolvent estate, this defendant was continued, by order of said court, as administrator *de bonis non* of said estate in insolvency; that due notice of said declaration of insolvency of said estate was given by said Probate Court, and that the claim of plaintiff's testator, described in the complaint was not filed in said Probate Court as a claim against said estate in insolvency within nine months of said declaration of insolvency, nor within nine months after said claim accrued; nor has it ever been filed in said Probate Court as a claim against said estate in insolvency.

“ 3. That the estate of the said William H. Ogbourne, deceased, was reported by this defendant, who was then the administrator thereof, on the 26th day of December, 1874, to the Probate Court of Montgomery county, which had jurisdiction of the administration, to be insolvent, and said Probate Court, on the 2d day of February, 1875, regularly heard and passed on said report, and regularly declared and decreed said estate to be insolvent, and gave due notice of such declaration and decree, and requested all persons having claims against said estate to file the same in said Probate Court, against said estate in insolvency within the time prescribed by law, and the defendant, under said declaration and decree, filed in said Probate Court his account as adminis-

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trator of said estate for a final settlement of his administration thereof, and in account charged himself with all the assets of the said estate, and that said account was duly and regularly heard, allowed and passed by the said Probate Court on the 5th day of March, 1875; that the claim against the estate of William H. Ogbourne, deceased, described in the complaint, was never filed in said Probate Court as a claim against said estate in insolvency, but that a large number of other claims were filed against said estate in insolvency, in said Probate Court, within nine months after said declaration and decree; and that on the 24th day of May, 1877, the defendant's account as administrator *de bonis non* in insolvency, which had previously been filed, and of which filing due notice had been given, was regularly heard, allowed and passed by said Probate Court; that in said account this defendant was charged with all the assets of the said estate; that on the 24th day of May, 1877, said Probate Court audited and passed on the several claims which had been filed in said Probate Court against the said estate in insolvency, and passed and allowed large claims against said estate, exceeding largely in amount the balance found in the hands of the defendant for distribution; and said court thereupon decreed to each of the owners of said claims, as allowed the *pro rata* share of said balance, to which each of said owners was entitled, and entered decree against the defendant for the said several shares respectively, and the defendant then and there paid up said several decrees in full, and in so paying said decrees distributed the whole of said balance among and between the several owners ascertained by said Probate Court to be entitled to payment out of said balance, and said decrees were each then and there fully satisfied, and the defendant then and there fully discharged by said Probate Court from the administration of said estate and all liability therefor.

"4. That the claim of the plaintiffs was not presented to the administrator of the said estate of said William H. Ogbourne, nor filed in the Probate Court of Montgomery county, within eighteen months after grant of letters of administration upon said estate, nor after said claim accrued as a claim against said estate."

The plaintiffs demurred to the second and third pleas of the defendant and assigned the following grounds of demurrer, viz.:

"1. The plaintiffs' claim being for funeral expenses was not such claim as is required to be filed against said estate.

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in insolvency when there were assets more than sufficient to pay all the preferred claims against said estate.

"2. That said plea shows the defendant had in his hands as such administrator assets more than sufficient to pay all preferred claims against said estate, and that he applied the same to the payment of claims against said estate inferior in order of preference to the claims of other creditors.

"3. That the report of said estate insolvent and a settlement of the same in the Probate Court, and payment of the assets to other claims filed in the Probate Court, furnishes no excuse for failing to pay out of said assets the claim of plaintiff.

"4. That it was the duty of said W. T. Hatchett, as such administrator, to pay the claim of plaintiff as soon as possible, and out of the first money received by him as assets of said estate.

"5. That said plea presents no facts which relieve the defendant from the duty of paying the claim of plaintiff out of the assets of said estate as received by him."

The court sustained the demurrer of the plaintiff. They then joined issue with the defendant on the pleas of "the general issue and statute of non-claim."

On the trial, it appeared that the testator (H. W. Hitchcock), had furnished for the burial of William H. Ogbourne, marble slabs of the value of one hundred and forty-one dollars. The marble was used in covering the grave. There was evidence tending to show "that William H. Ogbourne had formerly been a man of wealth, and that his standing and condition in life was highly respectable and equal to that of the best people in the community in which he lived." A witness, who was an undertaker, testified that "marble slabs and vault marble, such as the testimony described was used in the burial of persons of the degree and condition in life of the deceased," but on cross-examination he testified "that not one-tenth of such persons were buried with marble slabs and vault marble covering their graves."

The defendant introduced evidence showing the whole estate of William H. Ogbourne amounted to twenty-five hundred dollars, and that of this sum he had used seven hundred and fifty dollars in satisfaction of a mortgage upon a part of the said property; and "that one thousand dollars out of said sum was allowed the widow as her exemptions;" and that there remained in the hands of the defendant only seven hundred and fifty dollars with which to defray the expenses of the administration and to pay the debts of the

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decedent. The claims against the estate amounted to six thousand dollars, but all of them had not been "filed in the Probate Court against the estate in insolvency, but such as had been filed and allowed by the court exceeded the assets in the hands of the defendant as administrator."

The defendant asked the court to give the following charge, which was in writing, to the jury :

"If the jury believe that the estate of William H. Ogbourne, deceased, was not worth more than twenty-five hundred dollars, and out of this amount seven hundred and fifty dollars had to be paid in order to discharge part of the estate from mortgage, and that one thousand dollars was claimed and allowed to the widow for her exemptions, and that the debts against the said estate amounted to six thousand dollars, and that not more than one-tenth of the persons in the same standing and condition in life as said deceased, who died are buried with marble slabs over their graves, then marble slabs are not a reasonable expense incurred in the burial of the deceased.

The court refused to give the charge, and the defendant excepted.

E. J. FITZPATRICK, for appellant.—1. The demurrer to the defendant's pleas numbered two and three should have been overruled. The Code provides a set of rules as to insolvent estates complete in itself and entirely different from the common law. These rules vest in the Probate Court entire and exclusive jurisdiction of all claims against insolvent estates. *No creditor* can participate in the assets except by the decree of the Probate Court on his claim, even though the claim be a judgment of another court. Whatever the dignity of the claim, or the absolute certainty of its correctness, the decree of the Probate Court is necessary to be had upon it.—32 Ala. 611; 34 Ala. 556; 34 Ala. 540; 32 Ala. 502; 35 Ala. 574.

2. The decree of insolvency takes away from the administrator in chief all authority to pass and pay claims; if he assumes to pay, he can only reimburse himself by taking the place of the creditor and filing the claim himself.—36 Ala. 117. The decree of insolvency stops all suits except such as may have already begun, and the statute permits no litigation after settlement in insolvency.—34 Ala. 556. The cases of 3 Stew. & Port. 244, and 9 Port. 283, were upon an exception in the statute then in force. The statute now is without exception.

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3. In the face of the language of section 2568 of the Code, the court erred in holding the claim of the plaintiffs was not required to be filed.—Authorities, *supra*.

4. The charge requested by the defendant should have been given. The facts being ascertained, their effect was purely a question of law.

R. M. WILLIAMSON, for appellee.—1. The statute imposes the duty upon the administrator to pay the funeral expenses in preference to all other claims, and when he has assets sufficient, he is derelict in not doing so.—Code, § 2430.

2. Only those claims need be presented or filed against the estate in insolvency as must share *pro rata* with other claims. As soon as the administrator raises money sufficient to pay claims of a preferred class, it is his duty to pay them, and he can not by his neglect postpone such creditor to the remedy against the insolvent estate in the Probate Court. 3 Stew. & Port. 244; 9 Port. 283.

STONE, J.—“All claims against the estate of a deceased person, must be presented within eighteen months after the same have accrued, or within eighteen months after the grant of letters testamentary, or of administration; and if not presented within that time, are forever barred.

The presentation may be made, either to the executor or administrator, or by filing the claim, or a statement thereof, in the office of the judge of probate in which letters were granted; in which case, the same must be docketed, with a note of the time of such presentation; and if required, a statement must be given by such judge, showing the time of such presentation.”—Code of 1876, §§ 2597, 2599.

“The debts against the estates [of decedents] are to be paid in the following order:

“1. The funeral expenses,” &c.—Code of 1876, § 2430.

In the present case, the claim is for marble used in the burial of appellant's intestate; and we necessarily know that it was required and used before the administrator was appointed. “No letters of administration must be granted till the expiration of fifteen days after the death of the intestate is known.”—Code of 1876, § 2357. There is no proof or pretence that the marble was purchased by the intestate in his life-time, or that it was ordered by his administrator. Still, if suitable to intestate's estate and condition, it is a proper charge against the assets in the hands of the administrator. Burial of the dead is a public and private necessity,

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which, not being otherwise provided, may be furnished by a stranger, and the value made a first charge on the assets. Still, the expense of such burial must bear reasonable proportion to the condition and estate of the deceased; and if disproportionate, should be scaled to that standard.

The proof tends to show that the present claim was presented to the administrator for payment within eighteen months after his appointment; that the estate was then declared insolvent, and that the claim was not filed in the office of the judge of probate, within nine months after such declaration, verified," &c.—Code of 1876, § 2568. The main contest in this suit is, whether the claim in controversy is of a class which the statute requires to be filed against an insolvent estate. In *Harrison v. Harrison*, 39 Ala. 489, 496, it was said, "To be a claim against the estate, there must be the relation of debtor and creditor; and we are not aware of any conceivable case in which the claim of heirs and legatees to the estate, or parts of it, can be called claims against the estate. Claims against an estate are almost universally those claims against the testator or intestate, which existed and were left unadjusted, at the time of his death. I will not say there may not be exceptional cases, in which valid claims against an estate may have their inception after the death of the person, late its owner; but the general rule is the other way."—See also *Mulhall v. Williams*, 32 Ala. 489; *Fretwell v. McLemore*, 52 Ala. 124, 146.

Chapter 8, Tit. 1, Part 2, Code of 1876, commencing with section 2549, is devoted to insolvent estates of decedents. It does not propose to unsettle priorities in the payment of debts and liabilities, declared in other provisions of the Code. Its purpose is, when the assets are in fact, or apparently insufficient to pay all debts of every class, to withdraw litigation from other tribunals, and settle the whole estate in the one Probate Court, by which the estate is declared insolvent. See *Edwards v. Gibbs*, 11 Ala. 292. The proposition may be stated as an axiomatic truth, that when all the assets of an estate, faithfully administered, are insufficient to pay all the debts, preferred and non-preferred, including the proper expenses of administration, the estate is insolvent; and the policy of the law is that such estates shall be reported and declared insolvent. The first step in the report, to be made under oath by the executor or administrator, which report must aver that he is "satisfied the property of the estate is insufficient to pay its debts." This report must be accompanied by these schedules, or statements:

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1. "A statement of all the goods and chattels, evidences of debt and other personal property, with the estimated value of each, and the amount of money belonging to the estate.

2. A full statement of the real property of the deceased, or any interest therein; the local situation of such property; and the estimated value thereof.

3. A full statement of the claims against the estate, which have come to his knowledge; the character and amount of each claim; and the name and residence of each creditor, if known."—Code of 1876, §§ 2550–1. It will be observed that the first two of these statements or schedules, are required to show the entire assets of the estate; and the last, the amount of claims against the estate, which have come to the knowledge of the executor or administrator. In other words, a debit and credit balance sheet. This, if faithfully made out, presents a *prima facie* case of solvency or insolvency. In many cases, the inequality of the assets and debts will be very slight; and, in order to determine the question accurately, it will frequently become necessary to know the amount of each and every claim against the estate, preferred or non-preferred, as well as the entire assets. And an issue may be formed by any creditor, denying that the estate is insolvent; and on the trial of such issue, it will be competent to prove that the assets are greater, or the debts less than the sums set forth in the schedules.—Code, § 2555.

Now, the provisions and principles of law stated above go very far to show, that when an estate is declared insolvent, all after proceedings, as a rule, shall be transferred to, and settled in the Probate Court. There are exceptions to this rule, for which sections 2579, 2580 and 2581 of the Code make provision, and there may be some other exceptions; but the policy and general rule of law are as above stated. And section 2549 of the Code tends farther to show that all claims against an insolvent estate, preferred and non-preferred, should be adjudicated in one settlement.

There might be no reason for this ruling, if preferred claims were always of ascertained and admitted amounts. Such is not the case. Claims of the first class—for funeral expenses—must necessarily present two inquiries; First, their value, and, second, their suitableness to the estate and condition of decedent. And expenses of the last illness also present the inquiry of value. The personal representative, and creditors can raise these issues.—Code, §§ 2575, 2555. Under the various provisions of the statute copied above, and under the general policy of our insolvent system, we

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hold that preferred claims against an insolvent estate must be filed verified as other claims are. The administrator, however, if satisfied that he has sufficient assets, and the preferred claims are just and reasonable, may pay them, and bring them himself into his insolvent account, taking the risk of their allowance.

In the rulings above we have not been unmindful of the decision of this court in *Fennell v. Patrick*, 3 Stew. & Port. 244. That ruling was under a statute entirely different from our present system.—See *Humphreys v. Morrow*, 9 Por. 283. We are also aware that our present ruling, while it harmonizes well with subdivisions 1, 3, 4, 5, 6 of section 2430 of the Code, is probably inapt when applied to subdivision 2. This, however, does not change our views; for administration charges are open to objection and contest on settlement, whether previously excepted to or not.

The plaintiff's demurrer to defendant's pleas numbered 2 and 3 should have been overruled. The charge asked was rightly refused, because it sought to make the custom or practice of eight-tenths the controlling rule, as matter of law, by which the jury must be governed in determining the fitness of the expense, and reasonableness of the claim. This was probably proper evidence for the jury; but it was for them to determine whether the estate and condition of intestate were such as to justify the style of his burial.

Reversed and remanded.

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Injunction. Specific Performance.

1. *The law implies a covenant for the quiet possession of a lease.*—Although a lease does not contain an express covenant for the quiet possession and enjoyment of the premises during the term, the law implies it, and it is the condition on which rent is payable; but this implied covenant extends only to the acts of the lessor, or of those claiming under him.

2. *A landlord is not responsible for the unauthorized intrusion of his other tenants.*—In the absence of an express covenant, a landlord is not liable to one of his tenants for trespasses or unauthorized intrusions, on that portion of the premises rented to him by other of the landlord's tenants in the same building.

3. *The removal of a fence by the landlord is a disturbance of the tenant's rights.*—The removal by the lessor, without the lessee's consent, of the

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fences enclosing the leased premises, is a material disturbance of the rights of the tenant, and entitle him to recover for the damage sustained thereby.

4. *A lessee sued for rent, may recoup damages caused by lessor.*—It is now well settled that a lessee, sued for rent, may set up the breach of the lessor's covenants, from which he has sustained damage, by way of recoupment, to extinguish, or reduce the demand; this right, however, is purely legal, and in the absence of special equitable grounds, can not be asserted in equity.

5. *A judgment in a case of unlawful detainer against the lessee, will not prevent a resort to equity.*—A judgment against the lessee, in the statutory action of unlawful detainer, will not preclude a resort to equity; the right to possession is alone involved, and no recoupment or set-off is allowable, for the lessor's breach of his covenants.

6. *The alienees of the lessor occupy his position.*—Alienees of the lessor succeed to rights accruing subsequent to the alienation, subject to existing rights and equities of the lessee.

7. *In a suit for rent, the lessee must recoup the damages.*—If the lessee fails to recoup such damages, and suffers judgment to go against him in an action for the rent, he can not resort to equity.

Mrs. Sarah S. Watson leased to Mrs. Hannah S. Abrams the Montgomery Hall and its appurtenances, situated in the city of Montgomery, for a term of two years, beginning on the first day of October, 1870. The lease included the "eastern half of the vacant lot or lots back of the said hotel." The premises were to be used for a hotel or boarding-house. The lessor agreed "to fix the well and cistern on said lot so far as is necessary to put them in good using order, and to keep the roof in good repair to the end of the term." And the lessee agreed "to pay rent for the same at one hundred dollars per month, each month in advance, the first month upon taking possession: upon failure to pay for any month as above provided for, three days after demand," the lessee agreed that the lessor should, "at her option, terminate the lease, and re-enter and take possession," which the lessee agreed to surrender.

The lessee did not obtain full possession of the premises leased until the 15th day of October, 1870. The lessor's other tenants occupying the lowest story of the Montgomery Hall, intruded upon the yard and into the outhouses of the premises, to the annoyance and injury of the lessee. The lessor removed and sold the lumber composing the fence which enclosed the vacant lot. She did not cause the well and cistern to be cleaned and "put in good using order." This was done under the supervision and at the expense of the lessee. Nor did the lessor keep the roof of Montgomery Hall in good repair, as was required by the terms of the contract. By the failure so to do, many of the rooms became entirely untenable, and thereby the lessee sustained great loss. But notwithstanding the refusal of the lessor to

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comply with her agreement, the lessee fulfilled all her engagements until the first day of April, 1872. Having paid the lessor eighteen hundred dollars as rent for the premises, she refused to pay any more until the lessor should perform her contract. Thereupon, after demand for the rent, the lessor instituted an action of unlawful detainer against the lessee to obtain possession of the premises. On the 24th of May a judgment was rendered in favor of the lessor, who insisted upon the immediate issue of "the writ of possession."

Subsequently to the execution of the lease, Mrs. Watson removed to the city of New York, where she now resides. Afterwards Mrs. Watson sold the premises leased to Messrs. Eugene Beebe and Ferrie Henshaw. These parties demanded of the lessee rent for the month of May, and upon her refusal to pay it, threatened to bring suit for the possession of the premises.

Mrs. Abrams, the lessee, then filed a bill of complaint in the Chancery Court of Montgomery against Mrs. Sarah S. Watson, Eugene Beebe and Ferrie Henshaw. The complainant alleged, among other matters, that Mrs. S. S. Watson had no property in Alabama out of which the complainant could collect the damages she might recover, and none to her knowledge in New York, except what might be due her from Beebe and Henshaw for the purchase of the said premises. This allegation was not denied by her. The complainant prayed that "Mrs. Watson be enjoined from further proceeding to obtain possession of said property, by her present or any other suit; and that said Beebe and Henshaw be enjoined from bringing suit for possession of or for rent for said property; that Mrs. S. S. Watson be decreed to a full performance of the contract of lease; that the complainant have full compensation in damages, and that she be permitted to recoup or set-off a sufficiency against any claim for rent upon said lease now due, or to become due, for the term; that she be permitted to attach five hundred dollars in the hands of Beebe and Henshaw, due from them to Mrs. Watson; and that on final hearing said injunction be made perpetual, and that complainant have a decree against S. S. Watson for any amount found due her."

The defendant, Watson, admitted the allegations of the said bill, and demurred to it on the following grounds, viz.:

1. The complainant had "a plain, adequate and complete remedy at law."

2. That the bill shows that the complainant had no right

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to retain the "hotel and to set-off the use or rent against any supposed claim against the respondent."

3. The complainant had a remedy at law to set aside or reverse the judgment of unlawful detainer.

4. The complainant seeks by the bill to obtain satisfaction of any claim against the respondent out of rent due and falling due to the said Beebe & Henshaw, and to retain possession of the premises without security, for the remnant of the term.

5. The bill was multifarious, and contains no equity.

The court overruled the demurrer. At the next term thereafter, a motion to vacate and set aside the order overruling the demurrer, and granting a rehearing on the demurrer, was made.

The demurrer to the bill was then sustained, and the bill of the complainant was dismissed.

D. S. TROY, for appellant.—1. The demurrer was sustained, and at a subsequent term the same demurrer was overruled. This was erroneous. Lord ELDEN says when a demurrer is overruled, another demurrer, the same both in form and substance, can not be put in, because there can be no limit to such pleading.—11 Vesey, 68. A demurrer in equity is nearly the same as a demurrer at law. It is an appeal to the judgment of the court.—3 Black. Com. 446. And if overruled, the defendant is required to answer.

2. But granting that the rehearing might have been had at the same term of the court, it could not be had at a subsequent term of the court.—Rule Chancery, Revised Code, 834. But appellees *strictissimi juris* had no right to interpose a demurrer, not having asked time for that purpose. 10 Vesey, 444.

3. The complainant had a right to demand a specific performance of the contract, whose covenants had been broken by the lessor. The complainant had complied with the agreement fully and until the lessor also had performed her covenants, a further compliance on the part of the appellant would have caused irreparable injury to her.—Story Eq. Juris. § 721. She had a right to end the lease.—13 Sim. 477; 25 Wend. 443; and to be relieved from the payment of rent.—18 Vesey, 56 (M. P.) 60. The lessee being in possession, the vendees of the lessor took the premises with the knowledge of the lease, and are chargeable with all the equities arising therefrom.—Washb. on Real Prop. 323 *et seq.*

4. The principle is well settled that when the jurisdiction

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of a court of equity has attached, it will go on and settle all the equities between the parties.—31 Ala. 24; 1 Brick Dig. 639; §§ 56-7. The complainant had also the right to set-off or recoup her damages and to the other relief prayed for in the bill.—Adams, Eq. 223.

ELMORE & GUNTER, for appellees.—1. It has always been the rule that until the decree has, under the English practice, passed under the great seal, or been enrolled, and under our practice, until it assumes the character of a final decree, it is liable to be altered by the court itself, upon a rehearing. 2 Dan. Ch. Pract. 1221; 2 Smith, Chancery Pract. 17, 18, 19; Bacon's Ord. No. 1; 21 Ala. 179.

A decree is never final under our practice, unless it settles all the equities of the case and will support an appeal.—32 Ala. 13; 37 Ala. 453.

A demurrer overruled does not result in a final decree. If no answer is filed, a decree *pro confesso* must be taken, and a submission and final decree on such submission before an appeal can be taken.

2. A slight examination of the bill of complaint filed in this cause, will convince any one that the demurrer was well taken, and that the bill was properly dismissed.

The complainants' remedy at law, in any event, was plain, adequate and complete. If the judgment of the justice in the unlawful detainer case was *void*, the complainant could have fully protected herself by a writ of *prohibition* from a superior court of law.—2 Brick. Dig. 389.

If it was voidable or erroneous, her remedy by appeal was perfect.—Revised Code, § 3313; *Moore v. Jones*, 13 Ala. 296.

The bill clearly shows no right on the part of complainant to retain the possession against the vendees of Watson. It shows that the title to the property had legally passed to Beebe & Henshaw, and that they were entitled to the rents and profits, and yet it seeks to impound rents falling due to them, and to allow them to her on account of *legal damages* which the bill claims she was entitled to against Watson. The bill is in effect one against the vendees of Watson to subject their property to the satisfaction of legal demands of the complainant against Watson without attempting even to show a reason for such a liability and demand.

BRICKELL, C. J.—Though there may not be in a lease, an express covenant for the quiet possession and enjoyment of the premises during the term, the law implies it, and it is

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the condition on which rent is payable. In the absence of an express covenant, the lessor is not liable for the acts of mere trespassers or wrong-doers, disturbing the tenant in the quiet enjoyment and possession, or preventing him from entering on the premises. For such wrongs or trespasses, the law affords the tenant protection, and the covenant of the lessor which is implied, extends only to his own acts, or the acts of those claiming under him, or which are done under his authority, or under a title paramount. The complainant had ample remedy for the ejection of the tenants holding over, after the commencement of her term, and for the recovery of such damages from them, as resulted from the wrongful holding. There is no express covenant against such interruptions, nor is it averred they were authorized by the lessor. The intrusions of the tenants of the basement, so far as disclosed by the bill were mere trespassers, unauthorized by the lessor, and for which she rests under no liability. Taylor's Land. & Ten. § 304-17. True, it is averred, these persons *claimed* they had authority from the lessor, but this does not involve the fact of such authority.—*Jones v. Cowles*, 26 Ala. 612. In the consideration of the equity of the bill, all claim against the lessor because of these wrongs must be discarded.

Discarding them, the bill though it may be rather vague and indefinite in its allegations, shows, that the complainant was by the lessor molested in the rightful use and enjoyment of the premises, and that the covenants for repairs were broken, and that the resulting damages equalled, if they did not exceed the rent due, and which would accrue for the expiration of the term. The lease conferred on the tenant, the use and enjoyment not only of the hotel building, but of the lots of ground described. The lessor was as much bound to protect her in the use and enjoyment of the one, as the other, and was without right to disturb her in, or render less valuable the possession of either. The removal of the fences enclosing the lots, was a material disturbance of the rights of the tenant. It was probably an eviction, which would have authorized the tenant to abandon the lease. It certainly entitles her to recover the damages which she may have sustained from it.—Taylor's Land. & Ten. § 315.

In *Hill v. Bishop*, 2 Ala. 320, it was held, that a lessee, when sued for rent, had the right of recoupment for damages arising from the breach of the lessor's covenant to repair. Independent of our present statute, which enlarges the demands, the subject of set-off, embracing unliquidated

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demands, not sounding in damages merely, as well as liquidated demands, since the decision in *Greene v. Linton*, 7 Port. 133, without regard to the inquiry, whether the covenants in a deed, or the stipulations in a contract, were dependent or independent, a defendant, has not been driven to a cross-action, but has been allowed to set up by way of recoupment, damages resulting to him from the plaintiff's breach of covenant, or contract. And the general principle, is now well settled, that a lessee sued for rent, may set up the breach of the lessor's covenants, from which he has sustained damage, by way of extinguishing or reducing the demand.—Taylor's Land. & Ten. §§ 373-74; Waterman on Set-off, 580; *Ives v. Van Epps*, 22 Wend. 155; *Mayor, &c. v. Malie*, 3 Kern. 151; *Fairman v. Fluck*, 5 Watts, 516.

The right is legal, and if there was not some fact or circumstance intervening, embarrassing, or rendering its assertion impossible in a court of law, a court of equity would not interfere. The residence of the lessor in another State, rendering ordinary legal remedies against her unavailing, coupled with her insolvency, are circumstances which authorize a court of equity to interfere for the relief of the lessee. *Tone v. Brall*, 8 Paige, 596; *White v. Wiggins*, 32 Ala. 424; *T. C. & D. R. R. Co. v. Rhodes*, 8 Ala. 206; *Donelson v. Posey*, 13 Ala. 752. These facts concurring—the non-residence and insolvency of the lessor, would of themselves authorize the court of equity to take jurisdiction, for the relief of the lessee, if there is not a judgment at law against her, and she has not lost her right, because of her failure to make defence. The equity of the present bill is maintainable also upon another ground.

The fact is averred by the bill, and the demurrer admits, that the judgment in the action of unlawful detainer is founded wholly on the tenant's forfeiture of the lease, by the failure or refusal to pay rent on the day it was demandable. The lease contains the following stipulation: "The party of the second part agrees to pay rent for the same, one hundred dollars each month in advance, the first month on taking possession. Upon failure to pay for any month as above provided for three days after demand, the party of the second part agrees, that the party of the first part may at her option terminate said lease, and re-enter and take possession which the party of the second part agrees to give." Having paid rent for eighteen months of the term, the tenant refused further payment, because as she claims, the damages suffered

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from the breach of the lessor's covenants equal the rent due, and to accrue.

Covenants of this kind, for the forfeiture of a lease, and the re-entry of the lessor, by a breach of the lessee's covenant for the payment of rent, in courts of equity, and of law, are regarded as intended as a mere security for the payment of the rent. In a court of equity they are treated as the condition in a mortgage, by which at law, on default of the mortgagor in payment of the mortgage debt, the estate of the mortgagee becomes absolute and indefeasible. They are relieved against, as the mortgagor is relieved, on payment of the rent due, and damages which the lessor may have sustained.—Taylor's Land. & Ten. § 495; 2 Story's Eq. § 1315. And relief is afforded, though the lessor may in ejectment have recovered possession of the premises.—*Wadman v. Calcraft*, 10 Vesey, 67; *Davis v. West*, 12 Vesey, 475; *Hill v. Barclay*, 16 Vesey, 402. The principle on which the court proceeds, is that the right of the one party, and the duty of the other, is compensation. This may be afforded, as well by extinguishing or reducing demands against the lessor, as by a payment in money, if these demands are such as would be the matter of set-off or recoupment in an action at law by the lessor for the recovery of the rent. In *O'Connor v. Spaight*, 1 Sch. & Lef. 305, the accounts between the lessor and lessee, had become too complicated for adjustment in an action at law. The tenant refusing further payment of rent, the lessor claiming a forfeiture of the lease commenced ejectment for the recovery of possession, which was enjoined. And in *Beasley v. Darcy*, 2 Schoales & Lef. 403, a similar action was enjoined, because the lessee had demands growing out of the lessor's breaches of covenant, equalling the rent. In an action of ejectment, or in the statutory action of unlawful detainer, the right of possession alone is involved. The only inquiry the court can make, is whether the lease has been forfeited, and the lessor has the right of re-entry. There can be no set-off or recoupment allowed the lessee, because of the lessor's breach of covenants. This could be obtained only in an action *ex contractu*. The judgment in the action of unlawful detainer does not conclude the complainant, therefore, from relief in equity.

Nor is her right affected by the lessor's alienation of the premises. The alienees succeed to the right accruing subsequent to the alienation, but it is subject to all the existing rights and equities of the lessee, against the lessor.

The bill is not subject to the objection of multifariousness.

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All its averments, and its prayer for relief relate to the lease, the rights claimed under it, and the damages sustained by the lessor's breach of its covenants. By the alienation, and by the rights the alienees claimed under it, it was indispensable to full relief, and to the protection of the tenant against their claims, that they should be made parties.

We do not think the bill was subject to the demurrer, and the chancellor was in error in sustaining it. The decree is reversed, and the cause remanded.

STONE, J., not sitting.

Whitman *et al.* v. Reese *et al.*

Partition of Land.

1. *In a proceeding for partition of land all persons interested should be made parties.*—If in a proceeding instituted in a court of probate for the partition of land, it should appear that all the persons interested in the property are not made parties before the court, it can properly revoke and annul the order for partition.

2. *Such a proceeding is summary, and an error will not take away jurisdiction which has attached.*—Such a proceeding is statutory and somewhat summary in its administration. It is instituted by petition, and when it contains all necessary averments of fact to give the court jurisdiction, any error committed afterwards does not affect the jurisdiction.

3. *The Probate Court has no jurisdiction of such a matter when an infant is interested.*—But if it shows that the land can not be equitably partitioned under the limited powers of a court of probate, then its jurisdiction never attaches; and if there be infants, or persons not made parties, whose interests are affected, the proceeding is *coram non judge*, and void.

APPEAL from the Court of Probate of Lowndes.

Tried before the Hon. J. V. McDUFFIE.

The facts are stated in the opinion.

CLEMENTS & ENOCHS, for appellant.—1. It is well settled that the Probate Court had no power to vacate and set aside an order after the adjournment of the term, unless the order and decree were void.—40 Ala. 396; 14 Ala. 648; 18 Ala. 438; 16 Ala. 56.

2. The order of the 15th of October, 1876, is not void. The final order or decree of the Probate Court that had jurisdiction which was called into exercise by a petition containing all the necessary averments of facts, can not be void,

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although it might be irregular and liable to be reversed and set aside on an appeal.—Code of 1876, § 3498; 53 Ala. 152; 52 Ala. 55, 291.

3. The evidence shows that at the time of filing the petition the interests of the several owners were as averred therein.

WILLIAMSON & COOK, for appellees.—1. The jurisdiction of the Probate Court to order the partition of land is confined to those cases in which there are no adverse claim or title.—Code, 1876, § 3512. There is certainly shown interests in the land adverse to the claim set up in the first paragraph of the petition, that the five persons there named are the only and equal owners.

2. This appears to be an attempt to divide the whole of the land into five equal shares, when the petition shows interests not brought before the court, and also that the interests are unequal. The evidence shows adverse claims existed in the estate of Augustus Reese, and that this estate has not been settled.

STONE, J.—The present was a proceeding in the Probate Court to obtain partition of lands, alleged to be held and owned by tenants in common. The petition avers that the lands are equally owned by five persons, and the partition was made between said five persons; the commissioners reporting the said five lots to be of equal value. The proceeding was instituted under the statute, commencing with section 3497 of the Code of 1876. Section 3498 declares that “The application must set forth the names of all the persons interested in the property, and their residence, the property sought to be divided or partitioned, the interest of each person in the same, the number of shares into which it is to be divided, and if the application be for a partition of land, a full and accurate description of such land.”

The present is a statutory proceeding, somewhat summary in its administration. It is instituted by petition; and when such petition is filed, containing all necessary averments of fact to give the court jurisdiction, any error committed afterwards does not affect the jurisdiction of the court. It presents a question for review and reversal on appeal, but will not vacate the proceedings on a collateral attack.—*Fennell v. Tucker*, 49 Ala. 453; *Wimberly v. Wimberly*, 38 Ala. 40; *Guilford v. Madden*, 45 Ala. 290; 1 Brick. Dig. 939, §§ 351, 2, 3, 4, 5, 6. But if the petition shows there are interests in the land sought to be partitioned, not brought before the

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court; or, if it shows that the lands can not be equitably partitioned under the limited powers of the Probate Court, then the jurisdiction never does attach; and if there be infants, or persons not made parties, whose rights are affected, the proceeding is *coram non judice* and void.

The petition sets forth that the lands of which partition is sought, were owned by nine named persons, acquired by inheritance; the five, charged to be the present owners, and other four, to-wit: Elizabeth H. Smyley, Perry Reese, Julia T. Robinson and Augustus Reese. It then avers that three of the nine, Elizabeth H. Perry and Julia T., sold and conveyed their interest to the remaining six, of whom Augustus Reese was one. This left the land in six equal tenants in common. The petition then avers that Augustus died, leaving no children or will, and that his estate has been administered and settled up. The result of this was, to vest, by descent, in each of his eight brothers and sisters, (there is no averment that any except Augustus have died,) an undivided eighth part of his undivided sixth. It is then averred that the interests of Perry Reese and of Julia T. Robinson in said Augustus' share, have been conveyed to Mary C. Whitman, Geogia Reese, Lula McCurdy and George M. Reese, four of the present professed owners, and leaving out Florence McCurdy, the other of the five. The petition avers that the five claimants are equal owners of the entire land, but this must be treated as the mere conclusion of the pleader. The facts averred show that two-eighths of the interest of Augustus Reese, which descended to Perry and Julia T. belong to four of the claimants, while Florence McCurdy has no interest corresponding to this. It shows further that one eighth of the Augustus Reese interest is still in Elizabeth H. Smyley, and she is not made a party to the proceeding. It is thus shown by the averments of the petition that all the interests are not brought before the court, and that, according to the title shown, a fair and equitable partition of the lands can not be made. The petition fails to make a case for Probate Court jurisdiction, and the Probate Court did not err in revoking and annulling the order for partition.—*Jones v. Brooks*, 30 Ala. 588.

If the facts of this case be such as to justify an amendment of the petition so as to give the court jurisdiction, that motion, if moved for in the Probate Court, should have been granted.—*Fennell v. Tucker*, *supra*. No motion is shown to have been made therefor, and it is now too late.

Affirmed.

[Blum & Co, v. Mitchell.]

Blum & Co. v. Mitchell.*Injunction.*

1. *The consideration of a written instrument may be inquired into.*—The consideration of a bond, bill, note or other written evidence of debt, whether it is silent as to, or expresses, the particular consideration, is, in respect to the consideration, open to inquiry, and parol evidence may be received to explain, or to qualify, or to contradict any recital of consideration it may contain.

2. *A presumption in favor of the truth of the writing arises from lapse of time.*—But if a party deliberately, and with a full knowledge of its contents, voluntarily executes an instrument in writing, and acquiesces in its statements for several years, and so acts as to induce the holder thereof to rest in security upon the validity of the contract, a strong presumption arises that the writing speaks the truth, and this can be repelled only by satisfactory evidence.

3. *An answer not verified by oath is a mere pleading.*—An answer to a bill in equity, not verified by oath, must stand as a mere pleading, and should not otherwise be construed. Any admissions it may contain would be evidence for the complainant; and if its statements of matters of defence varied from the evidence, the evidence would be inadmissible, because there would be no pleading to authorize its introduction.

4. *Discrepancies between an answer and the depositions of a defendant do not necessarily affect his credibility.*—Discrepancies between the allegations of a defendant's answer, not sworn to, and his depositions, do not necessarily affect his credibility or lessen the force of his evidence.

5. *The mortgagee is chargeable with rents from the time of entry into possession.*—When a mortgagor files a bill to redeem the premises in the possession of the mortgagee, the latter is chargeable with the actual rents and profits received by him from the time he entered into possession, and credited with the annual taxes on the property he may have paid; the balance remaining each year should be applied, first, to the extinguishment of the interest on the mortgage debt, and the remainder, if any, to the principal.

6. *The mortgagor seeking to redeem must pay costs.*—The general rule is, that a mortgagor coming in to redeem must pay costs.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

D. C. Mitchell and Mrs. Mary F. Leak intermarried in December, 1874, and on the 15th of March, 1876, they filed a bill of complaint in the Chancery Court of Montgomery county against E. Blum & Co., to enjoin them from foreclosing a mortgage executed by Mary F. Leak on the second day of February, 1870. The other facts appear in the opinion.

SAYRE & GRAVES, for appellants.

BLAKEY & FERGUSON, for appellee.

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BRICKELL, C. J.—The undisputed facts of this case, are, that on the second day of February, 1870, the appellee executed to the appellant a mortgage of real estate to secure the payment of a promissory note, which is copied into the mortgage, and recites that its consideration was an advance made by the appellant to aid the appellee in growing a crop. The note matured—the law day of the mortgage expired, and the appellee voluntarily quit the possession of the premises; the appellant immediately entering without objection from the appellee, and remained in quiet and undisputed possession, until March, 1876, when he is proceeding to foreclose by a sale in pursuance of a power contained in the mortgage, and this bill is filed. There has been no previous complaint by the appellee of unfairness in the transaction, or of a want or failure of consideration, partial or total, for the mortgage debt. The averments of the bill are, that the mortgage debt, except as to the sum of one hundred and fifty dollars, is without consideration, and that the remainder of it, five hundred and eighty dollars, was intended to cover a debt which the appellant falsely pretended to be due him from her deceased husband. Relief against this debt, which by the misrepresentation of the appellant she was induced to embrace in the note, is the primary object of the bill. Whether she was aware of the fraud, and of the misrepresentation, at the time of giving the note and executing the mortgage, which seem to have been contemporaneous; or whether it was subsequently discovered, and if so, when and how, are matters of which the bill and the evidence fail to give us any information. It is averred in the bill, however, that there had been a settlement of all the transactions of her deceased husband with the appellant, and that he had before the making of the note and mortgage paid her a balance remaining in his hands after closing all such transactions. This fact ought at once to have put her on the inquiry, and excited her suspicions as to the truth of the representation. These undisputed facts of necessity raise inferences and presumptions against the case presented by the bill which ought to be removed by clear and convincing evidence.

No relation existed which gave the appellant any controlling influence over the appellee, or from which it can be supposed she reposed in him any greater or other confidence, than she would have extended to any person with whom she was dealing. It is out of the course of ordinary dealing, that one person without inquiry, and without examination, and without knowledge, yet with the means and opportunities of

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inquiry, and of examination, and of acquiring knowledge, should accept the mere assertion of another, that he was under a liability to him, and act on that assertion to the extent not only of admitting that liability, but enter into a written promise to pay it, the writing expressing another and wholly different consideration. And proceeding further, should execute a mortgage to secure the debt; and for six years, during the greater part of which the mortgaged premises are held adversely, should acquiesce in the validity and fairness of the transaction. The consideration of a bond, bill, note or other written evidence of debt, whether it is silent as to, or expresses the particular consideration, is in respect to the consideration open to inquiry, and parolevidence may be received to explain, or to qualify, or to contradict any recital of consideration it may contain. The presumption necessarily arises however, that when parties deliberately, and with full knowledge of the contents, voluntarily execute a writing declaring a particular consideration, that the writing speaks the truth, and this presumption must be repelled by satisfactory evidence by the party gainsaying it. The presumption increases in strength, if the party impeaching it, has acquiesced for an unreasonable length of time in the truth of its statements, and has acted on, and induced the other party to rest in security on the validity of the contract. These natural presumptions, it is of greater importance now to consider, since parties are allowed to testify as witnesses, and the direct evidence is most often in irreconcilable conflict. The real truth, can be evolved oftener by a consideration of their conduct *ante litem motam*, than of their words as witnesses in hostile litigation. There is no explanation of the conduct of the appellee—of her voluntarily quitting of the premises—of her acquiescence in the possession by the appellant—of her long delay in seeking relief against the contract into the making of which, as she avers, she was induced by fraud and misrepresentation, she had full opportunity of detecting, at the time of entering into the contract—a fraud and misrepresentation she ought to have suspected immediately, from the fact of the previous settlement of the dealings of her husband, on which a balance was found due him, and paid to her by the appellant.

If we concede her testimony now proves the consideration misrecited in the note and mortgage, and that as to the larger part of the note it is without consideration, and she was induced to give it and the mortgage by the misrepresentation of the appellee, her evidence must be taken with the presumptions against it to which we have referred. These pre-

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sumptions operate not only against the weight of her evidence, but they tend to corroborate the evidence of the appellee, which is consistent with the writings, and with the conduct of the parties. The deposition of Loeb, confirms the evidence of the appellee, and he is free from interest in the transaction. Nor do we think the discrepancies which are supposed to exist between the answer and the deposition of the appellee, are such as to affect his credibility, or lessen the force of his evidence. The answer is not under oath, the appellee having waived a sworn answer, and is not entitled to any more weight as evidence than the bill.—Code of 1876, § 3762. It stands a mere pleading, and should not be otherwise considered. Any admission it may contain, would be evidence for the complainant, and if its statements of matters of defence varied from the evidence, the evidence would be inadmissible for the want of pleading to support it. It must not be scanned however with the same jealousy as if it was under oath, evidence for the defendant, and discrepancies in its statements, and the evidence of the respondent, not rendering the evidence inadmissible, should not be more regarded than similar discrepancies in a bill, and the evidence of the complainant. The discrepancy in the answer and the evidence is not that the mortgage debt was not founded on a present consideration moving to the appellee from the appellant in money loaned or advanced, but rather in the uses to which the appellee said she intended to apply the money loaned. Such a discrepancy should not weigh against the testimony of the respondent corroborated as it is by the writings and by the evidence of an unimpeached witness.

Though the appellee is not entitled to relief, because of fraud, or a want of consideration for the mortgage debt, she is entitled to redeem, and the bill contains the averments necessary to entitle her to a decree for redemption. If redemption is claimed, the appellant should be charged with the actual rents and profits received by him, from the time he entered into possession, and credited with the annual taxes on the premises he may have paid; the balance remaining each year, should be applied first to the extinguishment of the interest on the mortgage debt, and the remainder if any to the principal. The costs should be charged against the appellee. The general rule is, that a mortgagor coming in to redeem must pay costs.—*May v. Eastin*, 2 Port. 414. We find nothing in the record, to take this case without the rule.

The decree of the chancellor is reversed and the cause remanded.

[Fitzsimmons v. Buckley.]

Fitzsimmons v. Buckley.*Damages.*

1. *A marriage license can not properly be issued to a minor without the consent of the parents or guardian.*—To authorize the issue of a license for the marriage of a minor, the parent or guardian must give his consent in one of the forms expressed in section 2678 of the Code of 1876, to the judge of probate himself.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

This was an action commenced by Thomas Fitzsimmons, at the June term, 1875, of the Circuit Court of Montgomery county, against Charles W. Buckley, to recover damages for the unlawful issue of a marriage license to celebrate the rites of matrimony between Sabe Whatley and Mary E. Fitzsimmons, a minor. By consent, a demurrer to the first count of the complaint was sustained. The court overruled the demurrer to the second count of the complaint. The defendant pleaded the general issue with leave to give in evidence any matter that might be specially pleaded; and the plaintiff joined issue.

The plaintiff offered in evidence the original marriage license described in the complaint, and the record of said license made and kept in the office of the judge of probate, "which were admitted by defendant to be such original license and record." The license was signed by the defendant, Charles W. Buckley, judge of probate, and bore date the 2d day of March, 1875.

The plaintiff testified that he was the father of Mary Emma Fitzsimmons, described in the "complaint and license," and that she was born on the 19th day of December, 1858. "On cross-examination this witness was asked by the defendant if he had not treated said Emma with harshness before the issuance of said license? The plaintiff objected to the question on the ground that it was irrelevant. The defendant stated that the purpose of this question was to show that plaintiff had, by harsh treatment, compelled his said daughter to leave him, and thereby, the plaintiff had lost the natural control over her, which made him the proper person to consent to the issuance of the said license." The

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court then overruled the objection, and the plaintiff excepted. The witness stated he had punished her in the spring of 1872 by whipping her on account of information he had received of her immoral conduct. In consequence of this punishment she had left plaintiff's house and went to the house of her uncle, where she remained two days, and then returned at his request—and she had remained at his house from that time until the Sunday night preceding the 2d day of March, 1875. He also testified, that up to the time of said punishment she had been a dutiful and affectionate child. On cross-examination, the plaintiff denied that he had ever at any time given his consent to the marriage of his daughter with Sabe Whatley; and that he had forbidden his said daughter to let Sabe Whatley come to the house of witness.

The defendant introduced Mary Emma Fitzsimmons as a witness, and asked, "if her father had given his permission to marry said Sabe." The plaintiff objected to the question, on the ground that the consent to the marriage required by the statute as a preliminary to the issuance of the license aforesaid by the defendant, could not be proven by evidence of consent given to said Mary Emma. The court overruled the objection, and the plaintiff excepted. The witness answered that her father had given her permission to marry said Sabe two or three months before she was married.

There was no evidence that the plaintiff had in any manner given his consent to the judge of probate to issue the marriage license.

The foregoing facts are sufficient for the complete understanding of the only questions decided by the court in this case.

E. J. FITZPATRICK, for appellant.

RICE, JONES & WILEY, for appellee.—1. The right of a father over a minor child may be forfeited by misconduct or by misfortune.—31 Ala. 425.—A father may also emancipate his minor child.—6 Ala. 501; 17 Ala. 14. Such misconduct, misfortune or emancipation, like any other fact, may be proven by circumstantial evidence.—8 Ala. 519. Issues as to facts of this kind, like questions of undue influence admit of a wide range of evidence.

2. The fact or circumstance is relevant though it be not part of the transactions on which the issue turns if the truth or falsehood of it may fairly influence the jury as to the

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whole case.—15 Ad. & Ellis (new series), 878; S. C. 69; Eng. Com. Law. Rep. 878. Evidence which at the beginning of a trial appears to be wholly irrelevant, often becomes relevant because of matter brought out during the trial. Observance of the foregoing principles impels the conclusion that there was no reversible error in the rulings of the court below, either upon the admission or exclusion of evidence.

3. "It is believed to be universally true, that when a claim of any sort is asserted in court, all those circumstances which go to defeat the claim and to show that the person asserting it has not a right to recover, may, and ought to be considered."—2 Cranch, 265; 31 Ala. 425.

STONE, J.—The defense in the present case, misunderstands both the letter and spirit of the statute, § 2678, Code 1876. The consent of the parent, or guardian, of a minor male under the age of 21, or female under 18, that a license may be issued for the marriage of such minor, is a present consent, required to be given, in one of the forms expressed in the statute, to the judge of probate himself. Anything short of this, would preclude a parent, who might at some time favor a prospective matrimonial union of his minor child, from afterwards changing his mind, and from exercising any volition as to the time when such marriage should be consummated. It would also open the door to much uncertainty and conflict of testimony, as was shown in this case.

Nor do we think that in such an issue as this, it is permissible to canvass the government of the household, or inquire whether the father, in correcting his child of twelve or fourteen years, did or did not inflict reasonable and justifiable chastisement. Such testimony can shed no possible light on the question of the girl's age, or that other question of prime importance, did the father give his consent, being personally present, or did he give it in writing, that the defendant might grant a license for the marriage of his minor daughter.

We deem it unnecessary to apply these principles to the various rulings in this case.

Reversed and remanded.

[Coker v. Shropshire.]

Coker v. Shropshire et al.*Bill of Injunction.*

1. *A deed of trust to indemnify sureties on a bond is not invalid as to existing creditors.*—A deed of trust on lands and personal property executed by a guardian of minors to save harmless sureties on his bond, and reserving to the grantor the right of possession of the property until the children arrive at their majority, is not invalid on its face as to existing creditors.

2. *One creditor can not enforce his rights so capriciously as to defeat the rights of others.*—If one party has a lien or interest in two estates, and another in only one of the estates, a court of equity will not permit the former to elect against which he will proceed, so as to defeat the claims of the latter: but the party having such interest in both estates can not be compelled to resort only to one of them, unless it is shown to be sufficient to satisfy his interest or debt; and a bill filed for such purpose, without a clear averment to that effect, is defective.

APPEAL from the Chancery Court of Cherokee.

Heard before the Hon. N. S. GRAHAM.

On the 15th day of February, 1859, one Andrew Poore was appointed guardian of the estates and persons of two minors, named, respectively, William H. Shropshire and John B. Shropshire. On the same day he executed a bond to the judge of probate of Cherokee county in the sum of six thousand dollars, conditioned for the faithful performance of the duties required of him by law as such guardian. This bond was also signed by David C. Daniel, Lewis Cunningham and Joseph L. Cunningham, as his sureties.

“Afterwards, on the first day of May, 1861, the said Poore executed and delivered to William L. Whitlock a deed of trust by which he conveyed to him, both real and personal property, for the purpose of holding his sureties on the said bond harmless, and also to secure the payment of the money which might be due to the said minors when they attained their majority. But it was expressly stipulated in the conveyance that the grantor should retain the possession of all the property conveyed until the minors should arrive at the age of twenty-one years.

On the 20th day of November, 1861, the said Poore made and delivered another deed of trust to the said Whitlock, and thereby conveyed to him personal property for the greater indemnity of the said D. C. Daniel, one of his sureties. Both of the deeds contained the same stipulations.

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None of the property conveyed was ever delivered to the trustee. The grantor retained possession, and exercised all rights of ownership over it, as absolutely as if no deed had been made.

On the 17th of December, 1864, the said Poore sold and conveyed to John W. Coker, one hundred and twenty acres of land, "known as the Blue Pond Place," which had already been conveyed to the said Whitlock, in trust, for the purposes already mentioned. The said Coker, to obtain possession of the land so purchased by him, commenced an action in the Circuit Court of Cherokee county against one Calvin Tucker, who held it adversely to the purchaser.

On the sixth day of May, 1869, the said Whitlock, trustee as aforesaid, filed a bill of complaint in the Chancery Court of the same county, against the said Coker, and at the January term, 1871, of the said court, obtained a decree perpetually enjoining him from the prosecution of his suit against the said Tucker.

The said Poore never made a final settlement of his guardianship. He "died in Massachusetts about the 18th day of March, 1872;" and "on or about the 26th day of June, 1873, one Hugh W. Cardon sued out letters of administration from the Probate Court of Cherokee county upon the estate of the said Andrew Poore, deceased, and assumed the duties of said appointment." The said decedent at the time of his death owned land in Cherokee county, which was not embraced in either of the deeds of trust made by him.

In 1873, the said William H. Shropshire and John B. Shropshire filed a bill of complaint in the Chancery Court of Cherokee county against "the said Hugh W. Cardon, as administrator of the estate of the said A. Poore, deceased, and said David C. Daniel *et als.*;" and at the hearing of the said bill at the January term, 1874, of the said court, a final decree was rendered *pro confesso* against the said defendants for one thousand dollars and costs," and to subject said lands to sale by the register of the said court.

Afterwards, the said Daniel induced the said Whitlock to sell all the land described in the said deed of trust, on the first Monday in February, except about forty acres, known as the Mapp tract. The sale of the land included the one hundred and twenty acres alleged to have been previously sold to the said Coker by the said decedent.

On the foregoing facts, the said John W. Coker filed a bill of complaint in the Chancery Court of Cherokee county on the 17th of March, 1874, against the said W. L. Whitlock,

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David C. Daniel, and his wife, Mary F. Daniel, and the non-resident heirs of the said Andrew Poore, Hugh W. Cardon, as administrator of said estate, and W. H. and John B. Shropshire.

The prayer of the bill was, "that the said administration of said estate be removed into the Chancery Court, and that the assets of the said estate be marshalled therein; and the said administrator proceed to take administration of all such assets as may be discovered in the adjudication of this case, and that the said sale made by said Whitlock on the first Monday in February last, of the said land bought by your orator from said Poore, be set aside and held for naught, and that the complainants in said bill of complaint of the said William H. and John B. Shropshire, their agents and attorneys, said D. C. Daniel, and register of your honor's court, be severally enjoined from selling the said land in orator's said deed from said Poore, mentioned," &c.

A writ of injunction was issued on the sixth day of April, 1874.

The respondents moved to dissolve the injunction, and demurred to and answered the bill of complaint. On the final hearing, the court sustained the demurrer and dismissed the bill of the complainant for want of equity.

WATTS & WATTS, for appellants.—1. The sole question in the case is whether the bill contains equity. The complainant was a purchaser for value. The terms of the deeds of trust authorize Poore, the grantor, to retain possession and exercise absolute control over the property till the wards arrived at age. These deeds were intended merely to indemnify the sureties on the bond of the guardian. Subject to this, Poore had full right to sell, and he sold all his right to Coker. This gave Coker a right to the possession of the place, and to receive its rents, issues and profits, until there was a forfeiture under the deeds of trust.—20 Ala. 798; 9 Ala. 633; 23 Ala. 770.

2. J. C. Daniel continued liable on the guardian's bond, and received more than enough before the compromise with the wards to indemnify himself. As against Coker he had no right to the land sold by Poore to Coker. His equity against a claim under the trust deed is complete, when it was shown that the only surety on the guardian's bond who was liable had received more from Poore than he had agreed to pay the Shropshires.—16 Ala. 454; 21 Ala. 705; 26 Ala. 728.

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3. Whitlock's bill enjoining Coker from prosecuting his suit against Tucker and a decree thereon, appealed to and now pending in the Supreme Court, can not destroy Coker's right to relief on the other facts of the case. That judgment could not conclude Daniel, who, under the facts in this bill, is the only party interested. In order that a judgment should be conclusive and an estoppel, it must conclude both parties. But the appeal suspends the operative effect of the decree of *Whitlock v. Coker*.—*Ex parte Scott*, 47 Ala. —; 5 Cranch. 261. It is manifest on the facts stated in the bill that Whitlock had no right to enjoin Coker from prosecuting his suit against Tucker, because no liability had been incurred by any of the sureties on the guardian's bond.

S. K. McSPADDEN, and J. B. WALDEN, for appellees.
1. If the bill be wanting in equity the injunction should be dissolved, whether the answers deny its allegations or not. 15 Ala. 501; 22 Ala. 583; High. on Inj. § 880. If the allegations are insufficient to warrant the interference of the court by injunction, it may be dissolved, although the bill may be retained for other relief.—27 Ala. 519; 37 Ala. 688.

2. If the answer contains a full and complete denial of the allegations upon which the equity of the bill rests, the injunction should be dissolved.—High on Inj. § 896; 38 Ala. 51; 35 Ala. 579. The answer must not only deny the equity of the bill, but must be sworn to, whether the bill waives the oath or not.—Rule 32, Revised Code, 827; 17 Ala. 258; 35 Ala. 282.

3. Upon a motion to dissolve an injunction, the answer must be regarded only so far as it is responsive to the bill; but the denial must be clear and explicit.—High on Inj. §§ 876, 883; 17 Ala. 667. If the charges in the bill are positive, and the answer only on belief, the injunction should be retained.—3 Ala. 498. But if the allegations of the bill are on information and belief, and the answer denies them in the same manner, the injunction will be dissolved.—High on Inj. § 896; 10 Ala. 485.

4. Injunction may be dissolved upon the answer of those defendants in whose knowledge the facts must be.—7 Ala. 539; High on Inj. §§ 910 and 913. Deception and misrepresentation on the part of those obtaining the injunction, affords strong ground for its dissolution.—High on Inj. § 585.

5. Coker, the complainant, can not come into equity to bring the estate of Poore to settlement: even a creditor must

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exhaust his legal remedies against a legal estate, or charge fraud upon his debtor before he can come into equity. But Coker is no creditor, and can not do so.—16 Ala. 548; 20 Ala. 661, 817; 31 Ala. 172. He is at most a purchaser with notice, and without consideration. If there are two funds, and all will not pay out the sureties, the prior lien is good. 1 Story Eq. §§ 633, 642, 643, and 1233, and 1235.

6. There was but one estate upon which the *cestui que trust* had a lien, and can not be required to elect. The complainant is in no condition to require the marshalling of assets or of securities.—1 Story Eq. §§ 633, 634.

BRICKELL, C. J.—The precise theory on which the bill is filed, it is difficult to determine. It may have been intended as a bill by a creditor seeking in equity to marshal the assets of a deceased debtor, and to subject lands he had aliened in fraud of creditors, and this in some of its aspects seems to have been the view of the pleader. Or, it may be that it was intended as a bill by an alienee of a mortgagor to redeem, seeking from the mortgagor an account of rents and profits, and of property embraced in the mortgage which he had converted and should be required to apply in extinguishment of the mortgage debt. Whether the one or the other be the theory of the bill, its allegations are too vague and indeterminate to justify any decree.

The validity of the deeds of trust to Whitlock, for the protection of the sureties of Poore as guardian, is sustained by several decisions of this court.—*Perkins v. Elliott*, 5 Port. 182; *Frow v. Smith*, 10 Ala. 571; *Hawkins v. May*, 12 Ala. 673; *Reynolds v. Cook*, 31 Ala. 634. The purchase from Poore, by the complainant, of a part of the lands subsequently, passed to him only the equity of redemption. A court of equity will for his ease compel the trustee and beneficiaries in the deeds of trust, to exhaust the other property conveyed, before resorting to the lands he has acquired. The principle is of general application, that where one party has a lien on or interest in two estates, and another has a lien on or interest in one only of the estates, a court of equity will not permit the former by his mere election to defeat and disappoint the rights and claims of the latter. The one must first proceed against and exhaust the estate, the other can not reach, if that is necessary to adjust the rights of both parties.—*Pullen v. Agricultural Bank*, 8 Sm. & Marsh. 337. It is not shown by the present bill, that the property conveyed by the deeds of trust, other than the lands aliened to

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the complainant, is of sufficient value to indemnify the beneficiaries in the deeds of trust. Without a clear and distinct averment of this fact, the principle can not be invoked.

As an alienee of the mortgagor seeking to redeem, the bill is wanting in necessary averments, and in an appropriate prayer. If in this capacity the complainant was seeking relief, he would be entitled to an account of all rents and profits received by the trustee, or the beneficiaries after the law day of the deeds of trust had expired. So, he would be entitled to an account of all personal property, if any, Poore had with the consent of the *cestuis que trust*, converted after they had notice of the alienation to him. And he would be entitled to a like account of any personal property the trustee with the knowledge and consent of the *cestuis que trust*, or the *cestuis que trust* may have converted after notice of his purchase. Of course we mean rents and profits of the real estate, and personal property conveyed by the deeds of trust, and not other real estate, or personal property which may have been held by Poore.

It may be the complainant can present a case entitling himself to relief, and that he may not be prejudiced by the insufficiency of the bill as it now stands, the decree of the chancellor is corrected so as to dismiss the bill without prejudice, and as thus corrected is affirmed.

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The Statutory Separate Estate of a Married Woman.

1. *The record of a judgment against the husband is not evidence of the nature of the articles purchased.*—In a proceeding under the statute to subject the wife's statutory estate, after judgment against the husband, the record of such a recovery is not evidence that the items, composing the account, were articles of comfort and support of the household.

2. *No change in the statutory separate estate can defeat proceedings against it.*—No change in the statutory separate estate existing and liable for the account when it was made, can defeat proceedings instituted to subject the estate to its payment.

APPEAL from the Criminal Court of Butler county.

Tried before the Hon. WALTER H. CRENSHAW.

At the February term, 1874, of the Criminal Court of Butler county, the following motion was heard and determined, viz.:

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"To Mrs. Nancy T. Cheatham, wife of Peter H. Cheatham :

"You are hereby notified that at the next term of the Criminal Court of Butler county, Alabama, I will suggest to said court, that at the August term, 1871, of said court, on, to wit, August 10th, 1871, I recovered a judgment against your husband, Peter H. Cheatham, for the sum of one hundred and fifty 72-100 dollars, damages, besides the sum of sixteen 60-100 dollars, costs of said suit, which said suit was brought to recover the value of certain goods, wares and merchandise, consisting of articles of comfort and support of his and your household, suitable to the degree and condition of life of his and your family, and for which he would be responsible at common law, and which goods, wares and merchandise were purchased by him and his family in the year 1870, while you were his wife, and that an execution has been issued against said Peter H. Cheatham, upon said judgment, and has been returned 'not satisfied' or 'no property.' I will further suggest to said court, that at the time of the purchase of said goods, wares and merchandise, in the year 1870, you were the owner and in possession of the following real estate, to-wit: The east half of south-east quarter and east half of north-east quarter of section seventeen; the east half of north-east quarter of section twenty; the west half of north-east quarter and west half of south-west quarter of section sixteen; the north-east quarter of south-west quarter of section twenty-three; all in township ten, range twelve, in Butler county, Alabama. Which said lands were then, and are now, your separate estate, secured to you and held by you under the constitution and laws of the State of Alabama, and which property you still own and possess. And I will move said court for an order for the sale of said lands, or so much thereof as may be necessary for the satisfaction of said judgment and interest and costs.

"CHARLES NEWMAN,

"by Herbert & Buell, Attys."

The notice of the motion was duly executed on the defendant.

On the trial of the case, the plaintiff, against the objection of the defendant, read in evidence the judgment against her husband, Peter H. Cheatham, rendered in the said court on the 10th day of August, 1871. The plaintiff also proved the "issue of an execution, and the return of the sheriff thereon, and that the judgment was wholly unsatisfied." He also proved the items of the account upon which the judgment was rendered, and testified that all the articles contained in

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the account were for the comfort and support of the household of Peter H. Cheatham, suitable to the degree and condition in life of his family.

The defendant offered to prove that some of the articles in the account were paid for at the time they were purchased, but the court refused to permit the proof to be made, or to "go behind the judgment," and to this action of the court the defendant excepted. The defendant also offered to introduce evidence tending to show that some of the articles were bought for the individual use of Peter H. Cheatham, but the court excluded the evidence, and the defendant excepted.

It was also proven on the trial that the larger portion of the statutory separate estate of the defendant consisted in gold coin. It was received from her father. During the months of January and February, 1870, her husband, Peter H. Cheatham, invested it in the land described in the motion above set out, and had the deeds of conveyance made to him. This was done without the knowledge or consent of the defendant, who filed a bill of complaint in the Chancery Court of Butler county for the reformation of said deeds, or to compel the said Peter H. Cheatham to convey the land to her. In October, 1872, the chancellor made a decree requiring him to convey the said land to this defendant.

WATTS & SONS, and P. O. HARPER, for appellant.—1. The judgment against the husband was no evidence against the wife, except for the purpose of showing such a judgment had been recovered. It was no further evidence against her than it would have been against a stranger. The general rule is well settled on this subject.—21 Ala. 813, 833; 35 Ala. 665.

2. In a suit against the husband, it is not necessary to aver that the articles were for the support and comfort of the household, &c., and therefore the judgment would furnish no evidence against the wife's separate estate on a motion.—Authorities, *supra*; 2 Port. 351; 36 Ala. 602; 29 Ala. 149. The court therefore erred in holding the judgment was conclusive in the motion against the wife.

3. This is a summary proceeding, and the record should disclose every fact necessary to entitle the plaintiff to such a remedy, and that it complies with the statute.—2 Brick. Dig. 464, § 1-2. In such cases, the judgment, whether by default or otherwise, must show affirmatively every fact necessary to give the court jurisdiction.—22 Ala. 61.

4. The decree for the conveyance of the land to the defendant was made October 25th, 1874; the account was contracted

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in 1870; the judgment against the husband was rendered August 10th, 1871. The lands were his, and could have been sold under execution on the judgment against him. At the time the account was contracted, the separate estate of the appellant was in money.—33 Ala. 522.

5. The verdict was a special one. But it does not find that the articles were suitable to the degree and condition in life of the family; nor for which the husband would be responsible at common law. It is essential that both of these facts should have been found.—31 Ala. 438; 47 Ala. —. No legal judgment could have been rendered on this verdict. This separate estate must have belonged to the wife when the goods were sold, and also at the commencement of this suit.—Authorities, *supra*.

5. The wife unquestionably had the right to prove that the account on which the judgment against the husband was rendered, was not such an one as would bind her separate estate. But the court refused to allow this proof to be made. In this action it erred.

HERBERT & BUELL, for appellee.

STONE, J.—The record of recovery against the husband was not evidence against the wife's separate estate that the items composing the account were for articles of comfort and support of the household, &c. Nor did such recovery preclude proof that the account had been paid in whole or in part.—*McMillan v. Hurt*, 35 Ala. 665, and other authorities cited by appellant.

A change of investment of the wife's estate, between the purchase and the motion to condemn such substituted estate for a debt for which the separate estate is liable, is no defense to the motion.

Reversed and remanded.

[Assessment Board v. A. C. R. R. Co.]

The Board for the Assessment of the Property of Railroad Companies v. Alabama Central Railroad Co.

Taxation of Railroads.

1. *The general assembly can not declare an artificial value of property.* The constitution does not authorize the legislature to prescribe or declare an arbitrary or artificial value of the property of individuals, or corporations, and assess taxes on such valuation.

2. *Section 383 of the Code of 1876 is unconstitutional.*—Section 383 of the Code of 1876 establishes a rule for the estimation of the value of railroad property for the purpose of taxation which is not authorized by the constitution; and, therefore, the assessment of taxes made in obedience to it is invalid, and was properly vacated by the City Court of Montgomery.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

A board for the assessment of property of railroad companies was established by an act of the general assembly of Alabama, approved February 2d, 1877.—Sec 383 of the Code of 1876. It consisted of "the Governor of the State, the Secretary of the State, Auditor of the State and the Treasurer of the State;" a majority of whom constituted a quorum. The statute provided, that "the valuation of the property of railroad companies shall proceed upon precisely the same principles as the valuation of every other species of property; that is to say, no deduction or allowance shall be made on account of any kind of indebtedness, or mortgage, or incumbrance of any character, but the valuation of such property shall be had exclusively upon the consideration of what a clear fee simple title to such property would sell for absolutely freed from all debts, mortgages or other incumbrances, under the conditions under which that character of property is most usually sold; but in no case where the data of such an estimate shall be in the possession of the board, shall such property be estimated at a sum less than that which, at an interest of eight per cent., would yield the sum shown by such data, to constitute the net earnings of such property, such net earnings to consist of the whole earnings, deducting the running expenses of such road; but in no case, nor to any extent, is any allowance or deduction to be made on any other account."

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At a regular session of the board, in 1878, the Alabama Central Railroad Company introduced evidence before it relative to the value of its property. The testimony tended to show that it was worth four hundred and twenty-two thousand seven hundred and sixteen 47-100 dollars. The evidence before the board also showed that the net earnings of the property was an amount which, at the rate of eight per cent., would be produced by six hundred and forty-four thousand seven hundred and twenty-two 47-100 dollars. The board, in obedience to the rule prescribed by the statute, estimated the value of the property at the last named sum. To this action of the board, the railroad company, by its attorney, excepted.

Subsequently a writ of *certiorari* was issued from the City Court of Montgomery, directed to the Board of Assessment, requiring it to certify a full and complete transcript of the record and proceedings of the said Board of Assessment to the City Court of Montgomery, in the matter of the assessment of the property of the Alabama Central Railroad Company.

And upon the trial of the case, the City Court vacated and quashed the assessment; and to this action of the court the Board of Assessment excepted.

JOHN W. A. SANFORD, Attorney-General, for appellant.

1. The ground upon which the assessment of taxes against the appellee was set aside and vacated, is the unconstitutionality of the act which establishes the rule of assessment. This is the only question in the case.

2. The board was established by an act approved February 9th, 1877, which is contained in section 383 of the Code of 1876. The rule prescribed by it, to ascertain the value of the property, when the net earnings of the company will permit it to be applied, is *not a rate of taxation*, but simply a mode by which the value of property may be ascertained; and when so found, the property of railroad corporations is taxed at the same rate as the property of natural persons. The constitution declares that all the property shall be taxed *ad valorem*.—Art. VI. § 1. The law under consideration does not conflict with this provision.

2. Value has two meanings. The one may be called "value in use;" the other "value in exchange."—Wealth of Nations, 1 vol. 29. Railroads have value in use, and the extent of their value may be ascertained by what they yield. The legislature, therefore, established the rule for estimating their

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value on their net earnings. The general assembly could, with as much propriety, authorize an inquiry concerning the income of a railroad company, for the purpose of enabling the Board of Assessment, to discover the value of its property, as it can empower the assessor to ask of the citizen a long list of questions for the purpose of ascertaining the value of his property. The difference of the questions depends on the difference of the nature of the two persons,—one being natural; the other, artificial. The inquiries, in both instances, have for their object the discovery of the value of property to be taxed. And when this is found, the property is taxed precisely at the same rate.

3. There is no part of the constitution which prohibits the general assembly from making any rules for the guidance of assessors in their inquiry as to the value of property; nor is there any provision which forbids the establishment of one set of questions for natural persons, and another for artificial persons. What is not inhibited by the constitution, State or Federal, the legislature can do.—*Dorman v. The State*, 34 Ala. 216. The only limitation upon its power would be the uniformity of the rules applicable to corporations or to natural persons. The method applied to one class of persons must apply to all the individuals belonging to it. If this be done, both the letter and spirit of the constitution are respected. If the policy of such a rule for the ascertainment of the value of railroads and their equipment be deemed unwise, the legislature, and not the courts, must change it.

PETTUS, DAWSON & TILLMAN, for Appellee.—1. The constitution of the State provides: "All taxes levied on property in this State shall be assessed in exact proportion to the value of such property."—See Art. 11, p. 145. And the fourth section of the same article declares: "The general assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one per centum on the value of taxable property within the State." And the sixth section of the same article provides, "that the property of private corporations, associations and individuals, shall forever be taxed at the same rate."

2. We insist that our constitution means that *all property* (not exempted by it) *shall be assessed for taxation, at its true value, and not otherwise*. This proposition is not denied by counsel for appellant in this case. The Attorney-General contends, however, that the *rule* prescribed by the statute is

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only a rule by which to ascertain the true value of railroad property. In this position he is mistaken.

The first part of the rule, and to which objection is not made, provides in substance that the property shall be assessed *at its real value*; or, as the constitution says, "*in exact proportion to its value*." But the part of this rule which we have *italicised* requires the board to go higher than the real value in all cases where the income or earnings, multiplied by $12\frac{1}{2}$, gives a sum greater than the true value.

3. The constitution says, in substance, that this property shall be "assessed in exact proportion to its value;" but this rule declares, that this property shall be assessed at $12\frac{1}{2}$ times its earnings, and not at its true value, if that is less than $12\frac{1}{2}$ times the earnings.

Again, this rule forbids that property should *decline in value*. It first declares that railroad property *can not earn* more than eight per cent of its value; and then it declares, that because, by the rule of earnings, the property was worth a certain sum *last year*, the same property, no matter how much worn or otherwise injured, *is certainly worth the same sum this year*.

Taxes are *levied each year*, and must, if the constitution is obeyed, be assessed in exact proportion to its value. It is plain therefore, that the assessment must be made at the true value of the property, *in the year* of the assessment, and not *in a former year*.

4. The constitution having prescribed the *ad valorem* rule, no other rule can be made by the legislature. Nor can the legislature declare a rule for ascertaining value which conflicts with this constitutional rule.

If the Legislature has power to say that *this* property shall be assessed at not less than $12\frac{1}{2}$ times its earnings, it can say that *all taxable property* shall be so assessed. Money is property, and if a thousand dollars were loaned at 16 per cent., and the interest collected, then, *by this rule*, the assessor must value \$1,000 in money at \$2,000 in money, if the rule were made general.

5. The *rule* by which the board was governed means this: You must, in all cases, assess property at as much as its full value; but you shall never assess it at less than $12\frac{1}{2}$ times the earnings. It is not possible to reconcile such a rule with our constitution.—*Atlantic R. R. Co. v. Board of Com.* 75 No. Ca. 474

But the court will remember that the State Board assesses *only* the railroad, including main and side tracks, and engines

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and cars. *All other property* belonging to railroad companies is assessed by county assessors. Depots, station-houses, machine-shops, machinery, tools, mules, carts, and all other real and personal property, other than the road and rolling stock, are taxed by assessments made in each county.

Yet, by this rule, you ascertain the income of the road, then you assess the road and rolling stock at $12\frac{1}{2}$ times the income, *just as though the depots, machine-shops, tools, &c., &c.*, did not contribute towards making the earnings. And then you tax the depots, machine-shops, tools, &c., &c., at all they are worth!!

BRICKELL, C. J.—The present constitution imposes limitations and restraints upon the legislative power of taxation which are not found in the earlier constitutions. It ordains that “all taxes levied on property in this State shall be assessed in exact proportion to the value of such property.” Further, “The general assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one *per centum* on the value of the taxable property within the State;” and further, “the property of private corporations, associations, and individuals of this State, shall forever be taxed at the same rate.” The revenue law, in providing for the assessment of the property of railroad companies, prescribes, as a rule for ascertaining the value of such property, that “in no case, where the *data* of such an estimate are in the possession of the Board of Assessment, shall such property be estimated at a sum less than that which, at an interest of eight *per cent.*, would yield the sum shown by such *data* to consist of the whole earnings, deducting the running expenses of such road; but in no case, nor in any extent, is any allowance or deduction to be made on any other account.”—Code of 1876, § 383.

The board for the assessment of the property of railroad companies, having before it evidence that the property of the Alabama Central Railroad Company was of the value of \$422,716.47, nevertheless assessed it at \$644,732.47; following the rule prescribed by the revenue law, because that sum, at an interest of eight *per cent.*, would yield an amount equal to its net earnings the preceding year, ascertaining such earnings by deducting only the running expenses. The validity of this assessment is the single question presented; and its validity depends wholly upon the inquiry, whether the general assembly had power, under the constitution, to prescribe the rule on which the assessment is based.

The constitution is plain, and imperative. The value of

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property, not its income, is the standard on which an assessment must be based. The legislature may prescribe rules, and may supply instrumentalities for ascertaining such value. It may, as it has done in other parts of the statute under consideration, clothe the assessors, or the board of assessment, with powers to obtain proper evidence on which they can proceed to ascertain such value. Though these officers, in observing these rules, and in passing on such evidence, should err to the prejudice of the State, or of the tax-payer, there would be no remedy for the correction of such error. The statute under consideration passes beyond providing a mere rule for ascertaining the value of the property of railroad companies. The value of such property can in no event be assessed at less than a sum which, at eight *per cent. per annum*, would produce its annual net earnings. If its net earnings, ascertained in the mode prescribed, will not produce a sum, at eight *per cent. per annum*, equal to the value of the road as otherwise shown, then the assessment of taxes must be on such value. In the one case, the income of the property furnishes a conclusive standard of value; in the other, it is wholly discarded. The legislature has not power to declare the value of property, and then assess taxes upon it as of that value; nor has it the power to assume and declare that the net income or earnings of property is an unerring test of its value. The value of the property, considering the uses for which it is employed, and the profit which may be derived from it, may be ascertained under rules which the legislature may prescribe. The value must be ascertained, and taxes assessed upon it. It is not competent for the legislature to declare that any species of property is of a particular value, because of its income, or to declare that the income alone shall be considered in determining its value. If the rule prescribed for the assessment of taxes on the property of railroads was applied to the assessment of the property of individuals, the violation of the constitution would not be doubted. Two planters own adjoining plantations of equal fertility, and of equal value in all respects; the one, by his skill, industry, economy, and prudence, derives a net income which, if regarded as eight *per cent. per annum* on the value of his plantation, would produce a sum exceeding its actual value; in the market it would not command such value; an artificial value would thus, by legislative enactment, be imparted to his plantation, and his thrift and industry be converted into a subject of taxation. The other could be taxed on the value of his

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plantation, though, from the want of skill or thrift, so far from deriving an income, he had in its cultivation been involved in debt. We can not read the constitution, without a conviction that its purpose is to free property from all arbitrary and artificial taxation—to limit the legislature to a specified rate of taxation on its value. The limitation would be in vain, if the legislature could prescribe a standard of value.

There can be no discrimination and no distinction between the property of individuals and of corporations. The constitution obliterates all such discriminations and distinctions; and while the legislature can not, as formerly, grant to corporations immunity or exemption from taxation, it can not subject them to any other standard or rate of taxation than that to which natural persons are subjected. If the legislature had declared that all railroads should be taxed as if the value of the road was so much per mile; or that all lands should be taxed as if they were of a particular value per acre, there would be no discussion of the question that legislative power had been transcended. What real difference is there, between such an enactment and an enactment like the present—that the net earnings of a railroad shall be regarded as eight *per cent.* of the value of its property? Why say eight *per cent.*? True, eight *per cent.* is the legal rate of interest; but is it consequently a legal standard, or a practical standard of the value of property, when such property will produce by way of income that sum? Property which will produce only that income, will but rarely find a purchaser who will invest in it for the purpose of obtaining interest only. The rate of interest is not a standard of the value of property, but the measure of damages fixed by law for the forbearance of a debt, the loan of money, or its detention after the day it should have been paid.

There are many and difficult questions to be considered, in subjecting the property of railroads to taxation according to its value,—the only taxation to which they may be subjected under the constitution. These are for the consideration of the legislature,—not of the judicial department of the Government. We are bound to declare the constitution does not authorize the legislature to prescribe or declare an arbitrary or artificial value of the property of individuals or corporations, and assess taxes on such valuation. This is attempted by the statute prescribing the rule by which the board of assessment was governed. The assessment is, consequently, invalid,—an excess of authority by the board.

[Stallworth, Adm'r v. Lassiter.]

The judgment of the City Court, vacating it, is therefore affirmed.

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Practice in Chancery.

1. *An answer should distinctly show what is alleged on knowledge and what on information.*—A denial of allegations on information and belief, by a defendant in a suit in equity, will not overturn positive averments; and if the answer of the defendant does not distinctly show what is alleged on his knowledge, and what on his information and belief, the decree of the chancellor will be affirmed.

APPEAL from the Chancery Court of Conecuh.

Heard before the Hon. HURIOSCO AUSTILL.

The bill of the complainant, Samuel O. Lassiter, shows that he was the son-in-law of William M. Stallworth, who died intestate at his home in Conecuh county in March, 1877. During the life of the decedent, the complainant executed to him two mortgages—one on or about the 15th day of May, 1875, upon the land therein described, and also upon his entire crop of corn and cotton produced on the land. The mortgage was made to secure the payment of a note for five hundred dollars, payable on the first day of January, 1876. In the fall of 1875 he paid, by the delivery of thirteen bales of cotton at the price of eleven and a quarter cents per pound, the amount due to William M. Stallworth, and had in his hands, as a part of the proceeds of the cotton, nearly one hundred dollars.

In January, 1876, the complainant executed a second mortgage upon the same land and upon the crops of corn and cotton that might be produced on it. This mortgage was to secure the payment of five hundred dollars lent to him, and for which he was to pay an interest of twelve and one-half cents; but of this sum, of five hundred dollars, he received only seventy-five dollars. This sum had been paid by the residue of the proceeds of the thirteen bales of cotton, remaining in the possession of the said William Stallworth; and thereby the second mortgage was satisfied.

On the 28th day of May, 1877, William M. Stallworth, Jr., was appointed by the Court of Probate of Conecuh county administrator of the estate of the decedent, who was his

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father. And on the 6th day of November, 1877, under the power granted in the said mortgage, he advertised for sale the land therein described. For the purpose of enjoining the sale of this property, the complainant filed his bill on the 15th day of November, 1877, in the Chancery Court of Conecuh. In accordance with the prayer of the complainant, a writ of injunction was issued to the said William M. Stallworth, Jr. The defendant filed his answer, containing denials made upon his own knowledge and upon information and belief, and also demurred on several grounds to the bill.

At the April term, 1878, of the Chancery Court of Conecuh county, the case was "submitted on motion to dissolve the injunction upon the denials contained in the answer, and also upon the demurrers." The demurrer was overruled, and the dissolution of the injunction was denied.

GEORGE R. FARNHAM, for appellant.

J. W. POSEY, for appellee.

STONE, J.—We find it difficult, if not impossible, to determine, either from the answer, or the affidavit attached to it, what is intended to be stated on knowledge of the defendant, and what on information and belief. He is but an administrator, and the charges in the bill are not presumed to be within his personal knowledge. Such denials do not overturn positive averments, and the result is the decree of the chancellor must be affirmed.—*Rembert v. Brown*, 17 Ala. 667; *Sheppey v. Davis*, at the present term.

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The Bond of an Administrator.

1. *Sureties on a bond of an administrator can not deny the validity of his appointment.*—Sureties on the bond of an administrator who qualified and obtained possession of the assets of an estate, can not when called to account for his breaches of duty, deny the validity of his appointment.

2. *A judge of probate may appoint his son to be an administrator.*—It is a manifest violation of judicial delicacy and propriety for a probate judge to appoint his son or relative to be the administrator of an estate, but such an appointment is not void.

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APPEAL from the Probate Court of Talladega.

Tried before the Hon. W. H. THORNTON.

On the 30th day of November, 1876, John Henderson, administrator *de bonis non*, of the estate of Daniel Wallis, late of Talladega county, deceased, obtained a decree in the Court of Probate of said county against Albert W. Plowman, a former administrator of the estate of said Daniel Wallis, deceased, for the sum of fifteen hundred and fifty-six 40-100 dollars. The said decree was rendered by said court on a settlement of the administration of the said Albert W. Plowman of the estate of Daniel Wallis.

Albert W. Plowman had been appointed by George P. Plowman, judge of probate of the said county, to be administrator *de bonis non* of the estate of Daniel Wallis, deceased, on the 12th day of August, 1870. On that day the said Albert W. Plowman executed a bond with Thomas S. Plowman and Nelson D. Johnson as his sureties. The bond was conditioned for the faithful discharge of his duties as such administrator *de bonis non*. Subsequently, on the sixth day of January, 1871, the said judge of probate made an order by which the said Albert W. Plowman was appointed administrator *de bonis non* of the same estate, and the said Albert W. Plowman executed a bond with the same sum and condition as that already described, with the same persons as his sureties. This bond was accepted and approved by the judge of probate on the 17th day of January, 1871. It does not appear that Albert W. Plowman ever resigned or abandoned, or was removed from the administration of the said estate, granted to him on the 12th of August, 1870.

An execution was issued on the said decree against Albert W. Plowman on the 11th of December, 1876, returnable on the second day in March, 1877, which was returned on the 12th day of March, 1877, with an endorsement of "no property" written upon it. On the 13th of March, 1877, an execution was issued on the said decree against the said Albert W. Plowman and his sureties, in favor of the said Henderson, commanding the sheriff "that of the goods and chattels, lands and tenements of the said Albert W. Plowman, Thomas S. Plowman and Nelson D. Johnson, he cause to be made the said sum of fifteen hundred and fifty-six 40-100 dollars with interest thereon and his fees." This writ was returnable to the second Monday in July, 1877. After the issue of this writ of *feri facias*, the said Thomas S. Plowman filed an application for a writ of *supersedeas* to restrain the sheriff from proceeding to collect the said sum of money by levy

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and sale of the property of the petitioner. In addition to the foregoing facts, the petition showed that George P. Plowman, the said judge of probate who appointed the said Albert W. Plowman to be administrator *de bonis non* of the said estate, and who approved the bonds presented by him, was the father both of the said Albert W. Plowman and Thomas S. Plowman, his surety. The writ of *supersedeas* was granted, and made returnable to the July term, 1877, of the said Probate Court.

At that term of the court the said John Henderson, administrator as aforesaid, demurred to the said petition in short by consent, and assigned the following causes of demurrer:

"1. The grounds on which the petitioner alleges said appointment, and the decree and execution thereon, are void, do not appear on the face of the proceedings; therefore, said appointment and decree and execution are not void.

"2. The said relationship can not be set up by this petitioner in this manner, to render the appointment and decree and execution void.

"3. The appointment of A. W. Plowman is at most only voidable and not void.

"4. Thomas S. Plowman signed the bond of A. W. Plowman, which recites that he has been duly appointed administrator *de bonis non*, &c., of the estate of D. Wallis, he is estopped to deny the fact he was such administrator.

"5. The petitioner as surety for A. W. Plowman as administrator *de bonis non* of Daniel Wallis is concluded by the settlement of A. W. Plowman as such administrator, &c., with John Henderson as administrator *de bonis non* of said Daniel Wallis, and he is estopped to deny any fact involved in that settlement.

"6. That the allegations of said petition are insufficient in law to authorize the court to quash the execution as petitioner prays may be done, and they are not sufficient to authorize the court to grant any other relief."

The court sustained the demurrer, and dismissed the petition.

JOHN T. HEFLIN, for appellant.—1. The doctrine of the common law is that when the Probate Court has granted letters of administration to a person entitled to them and capable of discharging the trust, it can not make a new appointment of an administrator until from some cause the office is vacated. A new appointment in the absence of such event or disability as vacates the office is totally void.—27

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Ala. 275-6; 8 Cranch. 9; 6 Ga. Rep. 432. Testing the action of the Probate Court by these authorities, its second appointment of an administrator is void.—4 Crouch 244; 20 Ala. 246; 21 Ala. 772.

2. The relation by blood in the first degree between the judge of probate and the administrator appointed by him, is a disqualification that prohibits the judge from making the appointment—the appointment being made in violation of law is void and may be successfully assailed collaterally as well as in a direct proceeding. “All that is necessary to know to overturn the judgment in such a case, is that the justice is related to one of the parties, and it matters not how and when it is shown, provided it comes in such a shape as to be entitled to credit.”—28 Barb. 511, 12.—Rev. Code; §§ 635, 808, 2302, 2305.

3. Section 635 of the Code was in effect, construed in *Claunch v. Castleberry*, 23 Ala. 91. It contains substantially the phraseology of section forty of the act approved February 11, 1850, which was interpreted in the foregoing case, and it is well settled that, where pre-existing statutes have been incorporated in the Code, it must be received with the construction given it by the Supreme Court.—26 Ala. 399; 28 Ala. 28; 29 Ala. 355; 29 Ala. 76.

4. The American adjudications, with almost unvarying unanimity, assert and vindicate, with unanswerable legal reason, the doctrine enunciated in *Claunch v. Castleberry*, 23 Ala. 91; and *Wilson v. Wilson*, 36 Ala. 655; that the action of a judge, when he is interested in the result of a suit, or is related to the parties, is *coram non judice* and void, 2 Chipman 96; 5 Verm't 125; 19 Johns. 172; 21 Wend 63; 1 Hill 655; 6 Selden 433; 20 N. Y. 313; 17 Barb. 410; 17 Barb. 414; 5 Dennis 66; 28 Barb. 511; 8 Johns. 409; 105 Mass. 225; 13 Gray 12; 3 Cush. 352; 21 Pick. 101; 9 ib. 287; 5 ib. 483; 45 N. H. 52; 9 ib. 63; 24 Cal. 73; 23 Texas 104; 11 Fla. 138; 19 Con. 590; 5 Caldwell 217; 13 Ind. 398. Therefore, the defendant's demurrer should have been overruled on all the grounds of demurrer assigned and the execution quashed.

GEORGE W. PARSONS for appellee.—1. The only question on the record is, “Was the demurrer to the petition of the appellant rightfully sustained?” The power to grant letters of administration is only restricted as provided by §1987 of Rev. Code, and the power and jurisdiction of the Probate

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Court in this matter is general and exclusive.—45 Ala. 694, 729; 33 Ala. 570; 37 Ala. 398.

2. This being true, there can be no question that the Probate Court of Talladega had jurisdiction to appoint A. W. Plowman, or any other person possessing the requisite qualifications, administrator *de bonis non* of the estate of Daniel Wallis, deceased.—Rev. Code, §§790, 792, 797, 2003, and 2004.

3. The relationship of the judge of probate to A. W. Plowman does not appear anywhere upon the records of the Court. All said matter is clearly outside the record of the proceedings, the decree and execution here sought to be annulled, and only appears by way of averment. For this reason, it seems, the demurrer should be sustained. A judgment claim or order of any court in this State, *void on its face*, will, at any time, on proper application, be vacated; but not for matter *dehors* the record, except the death of a party at the time of the rendition of the decree or judgment, or making the order.—5 Ala. 562; 9 Ala. 335; 28 Ala. 390; 49 Ala. 247, 546.

4. It is insisted that there is nothing in section 635 of the Rev. Code that renders a judge of probate incompetent to appoint a son, on a proper application, an administrator of an estate, or to approve a bond on which another is surety. In *Claunch v. Castleberry*, 23 Ala. 85, it was held that a judge who was on a bastardy bond of the defendant, had such an interest as to disqualify him from hearing the cause, though at that time the statute (acts 49, 50—p. 36, §40) differed materially from §635 of the Rev. Code. In *Underhill v. Dennis*, 9 Paige 202, the chancellor says that “I do not think that the appointment of the guardian in this case was absolutely void upon the ground of the relationship of the surrogate to the appointed guardian. . . .

“In the absence of fraud, the sureties of an administrator are concluded by a final settlement of their principal in the Probate Court. . . . If by reason of his second appointment and qualification he was, in the capacity as administrator *de bonis non*, by virtue of his office discharged from the sum charged against him, he could have shown this fact on his final settlement and protected himself from the decree that was rendered. This he did not do, and his failure is conclusive alike upon him and his sureties.”—36 Ala. 606; 4 Ala. 693; 5 Ala. 69; 14 Ala. 648; 16 Ala. 16; 19 Ala. 228; 20 Ala. 817; 25 Ala. 731.

The record shows that A. W. Plowman was twice ap-

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pointed administrator of the estate of Daniel Wallis, and executed two administration bonds for \$2,000 each, and with the same sureties on each. The last appointment is void, because there was no vacancy when it was made, and the last bond is also void.

BRICKELL, C. J.—The present appellants are not in a position to inquire into and dispute the validity of the grant of administration to Albert W. Plowman. The bond into which they voluntarily entered, and which is matter of record in the Court of Probate, affirms the validity of the grant, and enabled the principal to gain access to the trust, assume its authority, and take possession of the assets of the deceased. Now that he has abused the authority with which they asserted he was clothed, wasted the assets he received, and from his infidelity, they, or those, who relied on the bond as a security, must be involved in loss, they cannot escape from liability by a disputation of the fact the bond affirms. *Sproul v. Lawrence*, 33 Ala. 674; *Williamson v. Wolf*, 37 Ala. 298. "It is well settled that no one who has bound himself by an instrument under seal for the fidelity and good conduct of another in a private trust or public duty, can escape from the liability thus assumed under cover of an allegation that his principal was not duly designated or elected, or was subject to some legal disqualification which should have prevented him from accepting or administering the office."—2 Smith Lead. Cases 708. The precise question arose in *Cutler v. Dickinson*, 8 Pick. 386, and it was held the sureties in an administration bond are estopped by the recitals of the bond from denying the regularity of the appointment of their principal.

We cannot concede, however, that the grant of administration is void, because of the relationship existing between the administrator and the judge by whom it was granted. In our system, the grant of administration is formal, and, of course, unless a contest as to the right of administration arises, no right is determined, no interest is concluded. The Court, in the absence of a contest, simply appoints an officer or agent of its own, or whom the law devolves the ownership of the personal assets of the decedent. The judge of probate could well have declined to appoint to the trust his son; and if he had indulged proper considerations of judicial delicacy, would not have appointed him. He was without a right to or interest in the administration, and there was a manifest impropriety in his appointment. The

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judge stripped himself, by the appointment, of jurisdiction of every proceeding in the course of the administration which could be regarded as adversary, and not merely formal. It is not contemplated by the law that a judge shall, of his mere volition, thus divest himself of power and duty. The want of judicial delicacy or propriety does not render the grant void, and involve in grievous loss all who may have relied on its validity. The question has been decided by two deliberate adjudications of this Court.—*Hine v. Hussy*, 45 Ala. 496 ; *Hays v. Collier*, 47 Ala. 726. If we had doubts, even grave, of the correctness of these decisions, we could not be justified in departing from them. No legal question can more nearly touch the rights and interests of every class of the community than the validity of a grant of administration. It would reduce the community to the most painful insecurity if there was oscillation of judicial decision in reference to it. We must abide by the former decisions, declaring the relationship or interest of a probate judge does not render void a grant of administration. The judgment of the Court of Probate is affirmed.

Ruffin v. Hines.

Appeal from the Court of a Justice of the Peace.

1. *An appeal from the judgment of a justice of the peace will not be dismissed because the bond contains no property.*—A motion to dismiss an appeal from the judgment of a justice of the peace, because the appeal bond contains no penalty, is properly overruled.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. JOHN HENDERSON.

The mercantile firm of Lewy & Lewy brought suit before a justice of the peace in Coosa county on an account against Nathan Hines. A judgment was rendered in favor of the defendant for the sum of twenty 97-100 dollars. The plaintiffs appealed to the Circuit Court of the said county, and executed an appeal bond in the usual form, with Jesse L. Ruffin as one of their sureties. The case was continued by the plaintiffs both at the spring term and at the fall term, 1875, of the said court; and at the spring term, 1876, of the said court, the plaintiffs dismissed their appeal. Thereupon

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the court rendered a judgment against the plaintiffs and sureties for the sum of twenty-two 77-100 dollars, together with the costs of the suit.

On the petition of the said Ruffin, a writ of *supersedeas* was granted; and a motion was made by him in the following terms:

"Spring term, April 22d, 1876. Motion is made in this case to set aside, vacate and annul the judgment rendered in this case in favor of Nathan Hines against the plaintiffs and their sureties on their appeal bond, for all the costs that have accrued in the said cause, as to the sureties on the appeal bond, on the ground that the appeal bond on which this case was brought from the justice's court into this court, is without any penalty." This was continued.

At the fall term, 1876, of the court, the motion was "overruled and the *supersedeas* was dismissed," and the defendant excepted.

S. J. DARBY, for appellant.

W. D. BULGER, for appellee.

STONE, J.—The statute—Code of 1876, § 3654—which provides for appeals from judgments of justices of the peace to the Circuit Court, contains no clause which declares the sum or penalty in which the appeal bond shall be given. The party appealing must execute "a bond or obligation, with sufficient security, payable to the adverse party, conditioned to pay such judgment, both as to debt and costs, as may be rendered by the Circuit Court." The Circuit Court did not err in overruling the motion and quashing the *supersedeas*.

Affirmed.

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Claim of Exemption of a Homestead.

1. *Only actual occupation can impress on land the character of a homestead.* Under the constitution, lands are not exempt from liability for payment of debts, unless they have been impressed with the character and quality of a

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homestead, by actual occupation as a dwelling-place. When this character has been stamped on the land, a temporary absence, with the intention of returning and occupying the premises as a home, will not forfeit the right of exemption.

2. *Land leased for more than twelve months loses its character as a homestead.*—If a declaration and claim of exemption has been duly recorded in the office of the judge of probate, a temporary removal from the premises, or a lease for a term of not more than twelve months, will not operate as an abandonment of the place as a homestead; if, however, there is a lease for a longer term, and the acquirement of a homestead elsewhere, the right to exempt it from levy and sale is forfeited.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

The following statement of facts in writing was admitted to be true by both parties, and by consent, was read to the jury as evidence in the case:

“That Shulman, Goetter & Weil, the plaintiffs, recovered a judgment at the June term of the Circuit Court of Montgomery, A. D., 1875, on a contract made after the 23d day of May, 1873, which judgment was for three hundred and thirty-one 62-100 dollars, besides costs; that execution was issued thereon and placed in the hands of the sheriff by the clerk, according to law, and within thirty days after the adjournment of said court. That afterwards, on the 27th day of April, 1877, another execution was duly and legally issued by said clerk on said judgment, and was by him placed in the hands of the sheriff on the 30th day of April, 1877, and was by him, the said sheriff, levied, according to law, on lot number one, in square number (14) fourteen, in Scott’s plat, situated on the corner of McDonough and Pollard streets, fronting on said McDonough street sixty feet, and running back one hundred feet on Pollard street, in Montgomery, Alabama, which said property defendant has owned ever since the year 1870 up to the present time; that on the 30th day of August, 1877, the sheriff caused said property to be advertised for sale, according to law, to be sold on the first Monday in October, under said execution; that on the 26th day of September, 1877, the said Mary Boyle filed her exemption affidavit with the sheriff, claiming said property as exempt from levy and sale, under the constitution and laws of Alabama, and thereupon the sheriff gave plaintiffs due and legal notice of the filing of said exemption affidavit, and on the eighth day of October, 1877, the plaintiffs filed their affidavit with the sheriff, alleging that the defendant’s claim of exemption is involved entirely in their belief as to the execution, and afterwards all the papers were returned by the sheriff to the clerk’s office, according to law.

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"It is further agreed by the parties that the defendant did not reside upon and occupy the said premises, or any part thereof, from the second day of April, 1875, to the seventh day of October, 1877; that during said period, she lived in and occupied a house belonging to the estate of her deceased husband; that during said time she rented said premises so levied upon, to one William S. Hughes, under two written leases, by one of which she rented said premises to him from said second day of April, 1875, to the first day of October, 1876, and by the other lease she rented said property to him from the first day of October, 1877, to the first day of January, 1878; that on the seventh day of October, 1876, she, with the consent of said Hughes, annulled said second lease, and on that day entered upon and took possession of said premises, since which day she has continued to occupy the same, but from said second day of April, 1875, to the second day of October, 1877, the said Hughes continually occupied said premises under said lease.

"It was further agreed, that either party may introduce any witness, or witnesses, subject to legal objections."

The defendant, Mary Boyle, testified that "she was a widow, poor, and had five children dependent upon her for support; that she could save money by renting out the property in question, and by renting for her own occupancy a smaller house for a less sum, than she could get for her own house, which she did; that she gave the second and last lease because she had personally given a mortgage for several hundred dollars on said property; that the same was due and unpaid, and the mortgagee was threatening to foreclose; that the party to whom she rented offered to pay off said mortgage for said lease, and that not being able to raise the money otherwise, she, on said consideration, gave said lease." She further testified that "she was a resident citizen of the city of Montgomery, and had been so continuously for a long period of time, to-wit, twenty years, and that she claimed no other homestead than the property in question." This was all the evidence in the case, and the court charged the jury that "they will look to all the proof introduced, consisting of the admissions agreed upon between the parties and the oral proof made by the defendant to ascertain the intention of the defendant to abandon her homestead, and if they find she did in fact abandon her homestead by leasing it out, as specified in the admissions, then they should find for the plaintiffs." To this charge the defendant excepted.

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The defendant requested the court to give the following charges, which were in writing :

"1. If the jury believe from the evidence that the defendant is now in the actual occupancy in good faith of the property in question, claiming the same as a homestead, then they must find in favor of the defendant ; provided, they further find she is a resident of the State of Alabama.

"2. The status of the defendant to the property at the time of the trial of the right of exemption and before sale must govern, and if the jury find the defendant is a resident of the State of Alabama, and that she now, in good faith, owns and occupies the property in question as a homestead they must find for the defendant."

The court refused to give the foregoing charges, and to each refusal the defendant, severally and separately, excepted.

JOHN GINDRAT WINTER and R. M. WILLIAMSON for appellant.

SAYRE & GRAVES for appellees.

BRICKELL, C. J.—These causes dependent on the same facts, involving the same legal questions, were submitted together. In numerous cases, this court has declared, that it is not land merely, a debtor may select and retain as exempt from liability to the payment of his debts. On the land at the time of the selection or claim there must be impressed the character and quality of a *homestead*. It is the *homestead* only, which is withdrawn by the constitution and laws from the just claims of creditors. Actual occupation as a dwelling place, as a home, is the characteristic which distinguishes it from other real estate. A temporary absence from it, the character of a homestead having been impressed by a prior occupation, with the intention to return and occupy it as a homestead, would not operate an abandonment or forfeiture of the right to claim and retain it as exempt from the payment of debts. A man can no more have two homes, than he can have two domicils, at the same time. During his absence temporarily, occupation may remain with his servants or agents. But if he transfers his occupation and right of possession to a tenant, disabling himself for a term, from returning and resuming possession at pleasure, and acquires a home elsewhere, the right of homestead, and of exemption ceases.—*Austin v. Stanley*, 46 N. H. 51 ; *Horn v. Tafts*, 39 N. H. 478.

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The present statute qualifies the principle. If there has been a declaration and claim of the premises recorded in the office of the judge of probate, a temporary leasing or quitting for a term of not more than twelve months, at any one time, is not an abandonment of the homestead right.—Code of 1876, § 2843. It was an undisputed fact that at the time of the levy on the premises now claimed, they were in possession of a tenant of the appellant under a lease for a term of more than one year. The lease was made for the purpose of deriving profits from the premises, to extinguish an incumbrance on them. The appellant had acquired a homestead elsewhere, which was in her actual occupancy; and until after the levy, there was no selection or claim of these premises, and the claim when made was unattended with occupation. The leasing of the premises for a longer term than twelve months, and the acquisition of a homestead elsewhere, was an abandonment of the right of exemption. That right is conferred to protect the roof that shelters, and can not be converted into a shield of investments in lands, from which rents and profits are to be derived, whatever are the purposes to which these may be applied. Nor is the intention of the appellant to return and resume possession on the expiration of the lease material. The fact remains that she had acquired a homestead elsewhere, and it is legally impossible for her to have two homes at the same time.

The homestead right must exist at the time it is claimed. The subsequent entry and occupation of the premises by the appellant could not retroact so as to give her claim a validity, it did not have when interposed. Shifting the dwelling from one place to another, under the pressure of, and to avoid legal process to compel the payment of debts, is not sanction by the letter or spirit of the constitution, or the statutes.

The judgments are affirmed.

Beavers, Adm'r, &c. v. Hardie & Co.

Breach of Contract.

1. *The statutes of amendment are liberally construed.*—The statutes in regard to amendments of pleadings have been very liberally construed by this court. Amendments which do not change the form of action, the entire cause of action, or the parties to the action, may be allowed at any stage of the proceeding, so as to secure a trial on the merits.

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2. *An amendment supported by no evidence may be refused.*—But it is not error to refuse an amendment to which a demurrer would be sustained; or an amendment offered after the evidence of the plaintiff had closed, and which was supported by no testimony.

3. *A general exception is defective, unless all the charges are illegal.*—When a number of charges are given or refused, and only one exception to the action of the court is reserved, such exception will avail nothing unless all the charges excepted to are erroneous.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. GEORGE H. CRAIG.

This suit was commenced at the fall term, 1854, of the Circuit Court of Talladega county, by Graham Beavers, against John T. Hardie & Co., for an alleged breach of contract. The plaintiff having died, Major W. Beavers was appointed his administrator, and the cause was prosecuted by him. The facts are contained in the opinion.

JOHN T. HEFLIN, for appellant.—1. The charge asked by the plaintiff should have been given.—*Smart v. Sanders*, 54 Eng. Com. L. Rep's 379; S. C. 57 Eng. Com. L. Rep's 894, 916. If contemporaneous with the advances or liabilities, there are orders given by the consignor which are assented to by the factor, that the goods shall not be sold before a fixed time, in such case the consignment is presumed to be received, subject to such order; and the factor is not permitted to sell the goods to reimburse his advances until that time has elapsed.—14 Pet. 479.

2. The first charge, given at the request of the defendant, required the jury to ascertain whether or not a contract was made, and if so, whether it was such a contract as is contained in the complaint. It directs the attention of the jury to a selected portion of the facts, instead of to all the evidence in the case. Charge numbered three is subject to the same objection, and charge four is an invasion of the province of the jury.

3. The court erred in assuming that, if a sale was made on a particular day in the absence of a special contract, and no instruction had been given not to sell on that day, the jury could not find for the plaintiff.—7 Ala. 335; Story on Agency, § 333.

4. The court erred in refusing to allow the plaintiff to amend his complaint, because the amendment was necessary to adapt the pleading to the different phases of the evidence. 25 Ala. 320.

L. E. PARSONS, G. W. PARSONS and TAUL BRADFORD, for

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appellees.—1. The amendment which the court refused to allow, had already at that term of the court been allowed in substance and legal effect. The amendments, except the words: “and extend the same sixty days without charge for commissions for excepting the renewed bills of exchange,” were identical in language. The amendment allowed contains every averment contained in the one refused (the one above set out), and this averment adds no strength to the count.

2. The appellant argues that the first charge restricts the jury to the evidence of the appellant in determining whether there was a contract, and if so, whether it was such as is set up in any count of the complaint. The charge expressly instructs the jury that they may look to the testimony of the appellant for those two purposes, “among others.” It is insisted that it does not instruct the jury to look to no other evidence in determining those two questions, neither does it instruct them to look to it for those purposes only.

3. Charge numbered four says the appellant invades the province of the jury, because it assumes there is a conflict in the testimony. The charge does not assert there is a conflict, but instructs the jury they “must look to all the evidence to determine the several questions submitted” to them. But if it did assume there is a conflict, the appellant was not injured. For the record shows there is not only a conflict between the appellant’s and appellees’ witnesses, but between the witnesses of the appellant.

4. Here, then, is the question naked and salient. Can a consignor of cotton to be sold on commission, who has received advances nearly covering the value of the cotton, and those advances had assumed the shape of matured bills of exchange, accepted by the factor, require of him, before the sale of cotton, a request to be placed in funds? In this case such a request was no part of the contract. How then differs this case from *Brown v. McGraw*, 14 Peters, 479, and *Field v. Farrington*, 10 Wallace, 147? In them it was decided, when there is no agreement, and advances have been made, the duty of the factor is bounded by discretion exercised in good faith.

STONE, J.—The present action was commenced in 1854, and, for some cause not explained, was not tried until 1877. The original complaint contains five counts. A sixth was added, date not given. At the term of the trial—Spring, 1877—a seventh count was filed by leave of the court, which,

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it is supposed, was founded on the testimony of the witness Thomason. After the plaintiff had submitted his testimony to the jury, he asked leave to file an additional count, which the court refused to allow, and he excepted.

Our statutes in regard to amendment of pleadings have been very liberally construed by this court.—See Code of 1876, § 3155 *et seq.*; *ib.* 3006; *Russell v. Erwin*, 38 Ala. 44. With very limited exceptions—entire change of parties, change of form of action, or entire change of cause of action—amendments are allowed at any stage of the proceeding, so as to secure a trial on the merits. But certain rules must be observed, and certain limits should not be transcended. It is not error to refuse an amendment to which a demurrer would be sustained. And, pending the trial, an amendment should not be allowed, which is not necessary to secure justice between the parties. After the plaintiff has closed his testimony, he should not be allowed, by amendment, to present a cause of action which he has no testimony to support.

The count offered, number eight, like count seven, is manifestly based on Thomason's testimony, and is very slightly variant from count seven. The agreement and breach which are averred in the offered count are as follows: "That the cotton should be held ninety days on the advance, and that said Graham H. Beavers would be permitted to renew the bills of exchange, and extend the sum sixty days, without charge for commissions for accepting the renewed bills of exchange, which were to bear eight per cent. interest; the cotton so shipped to defendants was to be held that long, unless it could be sold for ten cents per pound, or was sold upon the written instructions of the said Graham H. Beavers. The said Graham H. Beavers shipped to the defendants the cotton then owned by him and the cotton purchased by him with money obtained from said defendants aforesaid, to be sold by said defendants at ten cents per pound, on the instructions of the said Graham H. Beavers; the said defendants afterwards, to-wit, on the — day of April, 1854, sold said cotton at seven and one-fourth cents per pound, without instructions from the said Graham H. Beavers." The seventh count avers the agreement to be "that the cotton should be held ninety days on the advance, and that the said Graham H. Beavers would be permitted to renew the bills of exchange, which were to bear eight per cent. interest. The cotton so shipped was to be held that long, unless," &c. The differences in the counts are two: The seventh count charges that, Beavers was to have the privilege of renewal after the ninety

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days, but does not state how long. Hence, there is no particular time after the ninety days, which that count avers the defendants agreed to hold the cotton, unless they realized ten cents a pound, or were instructed by Beavers to sell. The eighth count charges an agreement to hold sixty days beyond the ninety, making one hundred and fifty days, unless they sold for ten cents, or under instructions from Beavers. The second difference in the two counts is, that the seventh makes no allusion to the terms on which the renewed bills were to be accepted, while the eighth charges they were to be accepted without commissions. The testimony of the witness Thomason, if it outweighs the other testimony, tends to prove the truth of the averments, as set forth in the disallowed count. And the question arises, was the averment found in that count, and not found in the seventh, material? Was the variance between Thomason's testimony and the averments of the seventh count, of such character as to impair plaintiff's right to recover on that testimony, and under that count? Thomason's testimony stands unsupported in the precise averments contained in these counts. A table, shown in the evidence, proves that cotton had risen a half cent in the pound on 3rd May. The table extends no farther. One witness for plaintiff testified that cotton rose during the spring of 1854 to ten cents a pound. There is no testimony of its value or price afterwards. The seventh count charges an agreement to hold the cotton for ninety days, with certain conditions. The agreement was made March 3rd. Ninety days would bring June 1st. The spring expired with the month of May, and there was no testimony tending to show any rise in the price after that time, or injury to plaintiff, caused by not holding the cotton beyond that time. Under the seventh count, the plaintiff, if the agreement to hold was found by the jury, could have recovered all damage he had suffered by a sale before the first day of June. There was, then, no testimony given or offered, tending to show plaintiff could have recovered anything under the disallowed eighth count, which he could not equally recover under the seventh count. It is not error to refuse an amendment offered pending the trial, when there is nothing to show the party offering it was injured by the refusal. To hold otherwise might lead to great delay and abuse. Whether there was an agreement to hold the cotton and renew the bills for sixty days after the expiration of the ninety, did not affect the admissibility of Thomason's testimony, and we hold that the court did not err in refusing to allow the amendment.

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The second charge asked by plaintiff, and refused by the court, supposes, as one of its constituents, a fact of which there is no testimony in the record. Its language is, "the defendants were not authorized to sell the cotton for less than ten cents per pound after the maturity of the advancements made by the defendants on the cotton," &c. There is not only no testimony that the cotton was sold *after* the maturity of the advancements, but the uncontradicted testimony is, that the sale was made *before* the maturity of the advancements. This rendered the charge abstract, and justified its refusal, even if in all other respects it asserted correct legal propositions.—1 Brick. Dig. 338, § 41; *State v. Schuessler*, 3 Ala. 419.

To the giving of the five charges asked by defendants, there was one single exception reserved. Under all our rulings, such exception avails nothing, unless all the charges thus excepted to are bad.—1 Brick. Dig. 248, § 87; *McGehee v. The State*, 52 Ala. 224. Charge four is unquestionably free from error, and we think charge five correctly declares the law.—*Brown & Co. v. McGraw*, 14 Pet. 479. We need not consider the other charges.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

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Action on Sheriff's Bond.

1. *In an action against an officer, the actual injury is the measure of damages.*—In the absence of a statute inflicting a greater penalty, it is a general rule, in an action against an officer for neglect or other misconduct, the actual injury sustained is the measure of damages.

2. *An officer, who neglects a plain duty, becomes a trespasser ab initio.*—If a statute imposes a plain duty on a sheriff to deliver property to the party from whom it was taken, on failure of the plaintiff in a detinue suit to give the bond within the prescribed time, he has no discretion; and if he does not return the property, or delivers it to another person, he is guilty of trespass *ab initio*, and is liable on his official bond.

3. *In such a case, he cannot plead the title of the plaintiff.*—In such a case, he cannot set up the title of the plaintiff in the detinue suit, to prevent the recovery of damages for failure to restore the property to the defendant.

APPEAL from the Circuit Court of Etowah.
Tried before the Hon. WM. L. WHITLOCK.

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This action was brought against the defendant, sheriff of Etowah county, and the sureties on his official bond, for neglect of duty.

It was shown on the trial that one W. P. Hollingsworth brought an action of detinue on the 9th of April, 1875, against N. W. Gay, the plaintiff in this suit, for the recovery of a bay mare. On the summons and complaint was this endorsement: "Came to hand 9th October, 1875—T. J. Burgess, Sheriff, per S. D. Rumsey, D. S., executed the within by handing the defendant a copy of the original, and taking possession of the within described property; the defendant having failed to give bond as required by law. This 16th day of October, 1875. T. J. Burgess, Sheriff, per S. D. Rumsey, D. S." The plaintiff then proved that the mare was taken from his possession; that as the defendant in the suit he declined to give bond for the forthcoming of the property, and that the said Hollingsworth (then plaintiff) did not, within ten days from the seizure of said property, by said sheriff, under the writ of detinue, give the bond necessary "to authorize the sheriff to deliver the mare to him, and that the said Hollingsworth never did at any time give the required bond." "The plaintiff also proved that the defendant (Burgess), as sheriff, failed and refused to return said mare to plaintiff in this suit when demanded in 1876 by the plaintiff in this suit, and that he has never restored the mare to the plaintiff. The value of the animal was also proven by the plaintiff.

The defendant introduced as a witness the said W. P. Hollingsworth, and against the objection he was permitted to testify that the said mare was the property of the said witness. To this action of the court the plaintiff excepted. Other evidence of the title of the said Hollingsworth to the said property was admitted against the objection of the plaintiff. To this ruling of the Court he also excepted.

In rebuttal, the plaintiff introduced the judgment of the Court in the case of *Hollingsworth v. Gay*. It is in these words: Circuit Court of Etowah county. Fall term, 1875.

This day came the parties, by their attorneys, and issue being joined, thereupon, came a jury of good and lawful men, to-wit: Francis M. Burk and eleven others, who, being duly elected, empannelled, sworn and charged according to law, upon their oaths do say: "We, the jury, find the issues in favor of the defendant, and assess the value of the mare sued for at the sum of thirty-five dollars, and assess the

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damages for the detention thereof by the plaintiff at the sum of twenty dollars.

"It is therefore considered by the Court that the defendant have and recover judgment against the plaintiff for the mare described in his complaint, to-wit: A bay mare, about six years old, or the sum of thirty-five dollars as the alternative value of the said mare, by the said jury, so assessed together, with the said sum of twenty dollars, damages by said jury assessed as aforesaid, and the costs of suit. It is further ordered by the Court, that if said mare is not delivered by the plaintiff to the sheriff of Etowah county, and by him placed in possession of the defendant, within thirty days from the date of this judgment, then let execution issue for the said assessed value of said mare, together with the said damages for the detention thereof, and the costs in this behalf expended."

Among other things, the Court charged the jury "that if they believed from the evidence that the said mare in this complaint mentioned belonged to W. P. Hollingsworth, or any other third person, then the plaintiff cannot recover." And the plaintiff excepted. "The Court also charged the jury that they had nothing to do with the record of the trial of the cause between *Hollingsworth v. Gay*, which had been read to them." And the plaintiff excepted.

M. J. TURNLEY for the appellants.—1. The ownership of the property was not in issue, and the testimony of Hollingsworth on this matter was irrelevant and illegal, and should have been excluded from the jury.—1 Brick. Dig., p. 887, § 1189.

2. The objection to the introduction of the paper read by the defendants ought, for the same reason, to have been sustained.

3. The charge of the court, which withdrew from the jury the record of the recovery by Gay of the mare against Hollingsworth, was erroneous. Illegal and irrelevant evidence had been admitted against the plaintiff, and he had a right to show the record of that trial in rebuttal.

4. The charges by the court, at the request of the plaintiff, did not cure the errors committed by the court in the admission of illegal evidence, or obviate the injury inflicted by it. The charges of the court, taken altogether, were contradictory, and tended to mislead and confuse the jury.

W. B. MARTIN for appellees.—1. The action of the plain-

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tiff is misconceived; in other words, no action can be maintained against the sheriff and his sureties on his official bond for the cause of action set out in the complaint, and the court should have sustained the demurrer.

2. The sheriff rightfully took the property into his possession, and, if he converted it into his own use, he would have been liable in another form of action. His sureties were not liable on his official bond.

3. When the law creates a liability, and fixes a penalty, and provides the manner of its recovery, no other mode can be adopted. For a failure to return the bond mentioned in section 2946 of the Code, the law points out the remedy, and that is by motion. The plaintiff avers that the sheriff failed to take a bond from Hollingsworth in the detinue suit. If this be true, then he could return no bond, and the liability was fixed and the remedy pointed out.

4. The charge of the court *mero motu* was not erroneous, but was given in view of the testimony and not calculated to mislead the jury.

5. The court did not err in the admission of the testimony of Hollingsworth and the receipt of Gay, in which he promised to return the property to Hollingsworth, the plaintiff in that suit.

BRICKELL, C. J.—A sheriff, who has seized property under an order in a detinue suit, by the express words of the statute, is bound, on the expiration of ten days from the seizure, if the plaintiff in the suit fails to take it into possession by the execution of a forthcoming bond, to restore it to the possession of the defendant. Code of 1876, §§ 2942-43; *Hall v. Perryman*, 42 Ala. 122. The duty of obedience to the order of seizure, and of restoration, in the event of the failure to execute the forthcoming bond, are equally imperative, and are each official. A failure to perform either duty is a misfeasance, involving the sheriff and his sureties on his official bond in liability for the damages the party aggrieved may sustain.—*Governor v. Hancock*, 2 Ala. 728; *McElhanev v. Gilleland*, 30 Ala. 183; *Kelley v. Moore*, 51 Ala. 364.

The admissibility, and the effect of the evidence if admissible, that the ownership of the property was in the plaintiff in the detinue suit, is the important question of this case, and must control its final determination. As a general rule, in an action against an officer for neglect or other misconduct, the actual injury sustained is the measure of damages. Sedgwick on damages (6th Ed.) 634. A plaintiff in

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execution, seeking to charge a sheriff for a failure to sell property on which he has levied, is not entitled to recover beyond the value of the property, unless a statute inflicts as a penalty a larger recovery. And it is competent for the sheriff to defeat a right of recovery by proof that the defendant in execution had no vendible interest in the property, or that it was in fact the property of a stranger and not subject to the execution.—*Mason v. Watts*, 7 Ala. 703. Compensation for the injury sustained is generally the measure of right, and in cases of the character to which we are referring, it is permissible to show the value of the property, that the extent of the injury may be ascertained, or by showing the want of interest in the defendant in execution, to negative the existence of injury. But this case does not fall within the principle which controls that class of cases. A positive duty enjoined on the sheriff by the statute is the restoration of the property to the possession of the defendant, if the plaintiff fails for ten days to give bond for its forthcoming. The seizure of the property, depriving the defendant of possession, which is *prima facie* evidence of ownership, before a trial and judgment against him, is an extraordinary remedy. Protection to him against its abuse, the statute carefully secures. The order of seizure cannot be made by the clerk until the plaintiff first makes affidavit that the property belongs to him, and gives bond with surety for the payment of all such damages and costs as the defendant may sustain from the wrongful complaint, if the plaintiff fails in the suit. The defendant has for five days the prior right to give bond for the forthcoming of the property to answer the judgment. This right must be lost by the expiration of the five days before the plaintiff can obtain possession by the execution of a forthcoming bond, and he can obtain it lawfully only by the execution of such a bond. If he fails to give the bond for five days, after the expiration of the five days allowed the defendant, "the property must be returned to the defendant," are the words of the statute. The sheriff has no greater right to retain it, after the expiration of that period, than he had in the first instance to seize and take it from the possession of the defendant without the order of seizure, or without any process which would justify its taking. The duty imposed by the statute is plain and simple—it is restoration of possession to the defendant. The sheriff has no option, and it is not his province to inquire, nor has he authority to determine who is the owner, whether plaintiff or defendant. Indulging such inquiry and exercising

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such authority, he could, because he believed the defendant was the owner, have refused to execute the order of seizure. What is the measure of recovery, in an action by the plaintiff for neglect or failure to execute the order of seizure, is not a proper test of the measure of recovery by the defendant for a failure to restore possession. The sheriff is without authority to detain the property from the defendant. That order has expired, and he stands to the defendant, after a demand of restoration, in the attitude of a trespasser, especially when he has, in violation of the statute, delivered the property to the plaintiff without bond. The bond from the plaintiff is the security the statute affords the defendant for the restoration of the property, if there is judgment in his favor in the detinue suit. It is not for the sheriff to deprive him of this security, or to determine that he must fail in the suit, and therefore it would not profit him. When the sheriff refused to restore possession of the property to defendant, and delivered it to the plaintiff, he overstepped and abused the authority with which the law entrusted him, and was guilty of a wrong under color of his office, and must be regarded as a trespasser *ab initio*.—Six Carpenter's case, 1 Smith's Lead. Cases and notes 216; *McMichael v. Mason*, 13 Penn. St. 214; *Russell v. Hanscomb*, 15 Gray 166; *Brackett v. Vining*, 49 Me. 356. It would be against the policy of the law to suffer him to escape from the consequences of the wrong, by setting up the title of the plaintiff in the action of detinue, with which only the wrong connects him. If the defendant shall recover of him the value of property of which he is not the real owner, he has involved himself in the loss by his disobedience of the statute and a wanton abuse of the authority of the law. The court erred in receiving evidence of the title of the plaintiff in the action of detinue, and in its first instruction to the jury. The matter of the remaining assignment of error will not probably be involved on another trial.

Let the judgment be reversed and the cause remanded.

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Specific Performance.

1. *Transactions between attorney and client are closely scrutinized.*—Transactions between attorney and client, as between other persons occupying fiduciary relations, are anxiously and jealousy scrutinized by the courts, so that the client may be protected from the influence or ascendancy which the relation generates.

2. *Before the fiduciary relationship begins, any lawful contract may be made.*—An attorney may, before entering on the business of his client, lawfully contract for the measure of his compensation; and any contract then made is as valid and as unobjectionable as if made between other persons competent to contract with each other. But after the fiduciary relation has commenced, no subsequent agreement with his client for compensation can be supported, unless it is a fair and just remuneration for his services.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. B. B. McCRAW.

Taul Bradford and James B. Martin were partners in the practice of law; and while so engaged, they were employed as lawyers by A. Z. Dickinson in the prosecution of certain suits in his favor against Thomas Henderson, administrator *de bonis non*, with the will annexed, of Shadrack Dickinson, deceased. During the continuance of their employment by Dickinson, he made and entered into this agreement with them, viz.:

The State of Alabama, Talladega County. This agreement, made and entered into by and between A. Z. Dickinson, and Taul Bradford, and James B. Martin, witnesseth: That at the sale on the 25th of October, 1869, by Thomas Henderson, administrator *de bonis non*, with the will annexed, of the estate of Shadrack Dickinson, deceased, of the lands belonging to the said estate, and the mill and water power upon said lands and upon Chocoloco creek, wherever it may run through said lands, or any part thereof; there being two hundred and seventy-five acres of said lands (not including dower of decedent's widow), and the same being known as the "Dickinson Place," and upon which he lately, before his death, resided, and whereas the said Bradford, and the said Martin, are prosecuting claims in favor of the said A. Z. Dickinson, and against the estate of the said decedent, for \$2,800, or \$3,000; and whereas said lands were bid off at

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said sale by James B. Martin for the said A. Z. Dickinson. Now it is agreed that in consideration of the services of said Bradford and said Martin in prosecuting said claims against said estate as aforesaid, that the said A. Z. Dickinson is to, and will, convey to said James B. Martin and Taul Bradford, a one-half interest in all of said lands and property hereinbefore mentioned, just as soon as said sale is confirmed by the proper court, and the title directed to be made by said administrator *de bonis non*, with the will annexed.

JAMES B. MARTIN,
A. Z. DICKINSON,
TAUL BRADFORD,

Witness: RANDOLPH NEWSOM.

After the execution of the foregoing agreement, the firm of Bradford & Martin was dissolved, and Bradford became the sole owner of the interest in the land agreed by Dickinson to be conveyed to Bradford & Martin. After the dissolution of the partnership, Bradford continued "in sole charge as attorney of said Dickinson, of the cases in the Circuit Court of Talladega county, and conducted them to a successful issue in his favor."

On the first day of July, 1873, Taul Bradford filed a bill of complaint in the Chancery Court of Talladega county, against A. Z. Dickinson, for the purpose of enforcing a specific performance of the said contract. The other facts of the case sufficiently appear in the opinion of the court.

JOHN T. HEFLIN, for appellant.

W. H. FORNEY, and RICE, JONES & WILEY, for appellee.

BRICKELL, C. J.—The bill is filed to enforce the specific performance of a contract, made between attorney and client, after the relation had been formed, by which the client, in consideration of services which had been, and were to be rendered, covenanted to convey to the attorney an undivided half of a described tract of land. There are many disputed questions of fact involved, which are immaterial in the view we are constrained to take, and a consideration of which is, therefore, unnecessary. The relation of an attorney to his client is one of trust and confidence, in which influence is of necessity acquired. The law does not incapacitate him from contracting with, or from becoming the recipient of the bounty of the client. It does, however, command that all his transactions with the client shall be anxiously and jeal-

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ously scrutinized, that the client may be protected from his own overweening confidence, and from the influence or ascendancy which the relation generates.—1 Story's Eq. §§ 310-14; 2 Lead. Eq. Cases (4th Am. ed.) 1216. There may be no trace of deceit, or of imposition, or of overreaching advantage—no mark of actual fraud, which would justify a court in interfering for the rescission, or in refusing to compel performance, if the contract had been made between persons not sustaining a relation in which confidence was reposed, and influence acquired. The court does not interfere, or refuse interference, because there has been deceit, or imposition, or actual fraud, but independent of such facts and ingredients, upon considerations of public policy, to prevent fraud, an abuse of confidence and influence, and to compel fidelity and unselfishness in the performance of fiduciary duties.

In this State, attorneys and solicitors, are entitled to compensation for their services. Before entering on the business of the client, and suffering him to repose in them, the trust and confidence of the relation, they may stipulate the measure of their compensation, and if the client assents, the contract is as valid, and as free from objection, as any other contract into which he may enter. But, if they assume the relation, enter on the duties, thereby inviting confidence, and acquiring influence, without expressly stipulating the measure of compensation, no subsequent agreement with the client can be supported, unless it is satisfactorily shown that the compensation does not exceed a fair and just remuneration for the services which have been, and which it is the duty of the attorney to render.—*Lecatt v. Salle*, 3 Port. 115; *McMahon v. Smith*, 6 Heisk. (Tenn.) 167; *Planters' Bank v. Hemberger*, 4 Cald. 578.

Standing, as the parties do, in a relation of confidence, which gives the attorney or solicitor an advantage over the client, the burthen of proof lies on the attorney or solicitor; and to support the contract made while the relation existed, he must show the fairness of the transaction, and the adequacy of the consideration. The principle is thus stated by Judge STORY: "But the burden of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other."—1 Story's Eq. § 311. In the American note to *Huguenin v. Basely*, 2 Lead. Eq.

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Cases, 1216, the principle is stated as follows, and numerous authorities cited in support of it: "In England, the policy of the law forbids an attorney to contract with his client, or accept any benefit from him, beyond the remuneration to which he is entitled for his professional services; and although the rule in this country is less stringent, such transactions are closely scrutinized, and the burden of the proof is on the attorney to show, not only that he used no undue influence, but that he gave his client all the information and advice as against himself, which it would have been his duty to afford, if he had been duly retained in a matter where his own interests were not involved. It should, moreover, appear that the transaction was not disadvantageous to the client, nor one which a prudent man would have declined. If it is a contract, *the consideration must be full*, if a gift, it must not be so large as to impair the donor's ability to provide for himself, and the members of his family; and the burden of proof on these and other material points is on the attorney, and not on those who seek to avoid the deed or transfer."

Having entered on the duties of the relation without a contract stipulating the measure of compensation, the appellee and his partner, had no other legal claim on the appellant, than the right to demand of him reasonable compensation for their services. If the contract subsequently made stipulates for greater compensation, it can not be supported, unless it affirmatively appears that there is an absence of undue influence, and the best evidence of its absence, would be that the attorneys gave to their client the information and advice, which it would have been their duty to give, if the client had been dealing with a stranger, conferring on him the same rights and advantages, on the same considerations, which the contract confers on them.

The claims which the attorneys were prosecuting did not amount to three thousand dollars. They were not litigated, and were against a decedent, whose estate had been declared insolvent. It was not supposed that the full amounts of the claims could be collected, though by a vigilant scrutiny of other claims against the decedent, it was supposed the dividends of the assets applicable to these claims would be increased. The lands, an undivided half of which the appellant covenanted to convey to the attorneys, had been purchased by him at public sale for cash, a few days previous to the contract, Martin, one of the attorneys, bidding for him, at the price of thirty-one hundred dollars. The value of the lands was not less, according to the estimate of any witness,

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than twenty-five hundred dollars. The lands were the estate of the decedent, and constituted the only source from which funds were to be derived for the payment of his debts. The amount actually realized by the appellant on his claims, was twelve hundred and fifty dollars, and this was allowed to him in part payment of the purchase-money of the lands. The result of the contract is consequently to give the attorneys, as compensation for their services in the prosecution of the claims, not only all, which was realized on them, but to compel the appellant to pay three hundred dollars in money, that they may obtain an undivided half of the lands. It is too plain, a prudent man would have declined entering into a contract, involving such consequences, if free from extraneous influences.

The evidence fails to show, that in any event the reasonable compensation of the attorneys, could have exceeded three hundred dollars, and it fails to show that when this contract was entered into, the appellant was not under the influence, and that it was not the offspring of the influence of the relation existing between the parties. There was no information to the client, that he was liable only for reasonable compensation, or of the amount of such compensation. There was no communication to him, that he was bound to pay the sum he had bid for the lands, or that if he failed, he could be made liable for the difference between the sum he had bid, and the price they commanded on a resale, and that if such liability was incurred, he must bear it, the attorneys not sharing it, and he remaining liable to them, for reasonable compensation for their services. Nor is it shown, that he was advised, that if the contract into which he had entered, could be enforced according to its terms, the judgment on his claims might be adverse, and nothing realized from them, and yet, if he paid the purchase-money, he would be bound to convey to his attorneys an undivided half of the lands. Independent of all these considerations, the traces of the influence of the relation, developed themselves, at the moment of the execution of the contract. It was produced by Martin, and he said to the subscribing witness, that he wished him to attest it, with the declaration to the appellant that it was a long instrument, and there was no necessity for reading it to the witness, to which the appellant assented. The instrument is not long, containing not more than two hundred and seventy words, and the reason for not reading it, is certainly frivolous. There was no necessity for reading it to the subscribing witness, or that it should be read by

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him, yet, there was a manifest propriety in requiring him to read it aloud to the appellant, that there should be satisfactory evidence the appellant had full opportunity to know its contents. There is no evidence, when it was written, though it is not a disputed fact that it was written by Martin; nor is there evidence that it was ever read to appellant, or that he was informed of its terms and operation before executing it. Without disregarding well established principles the contract can not be enforced. Though most often, the validity of contracts between persons standing in confidential relations, is contested in suits for the rescission or cancellation of such contracts, the causes which will authorize their rescission are available against decreeing specific performance of them.

If the appellant had been the actor, seeking a rescission of the contract, the court would have compelled him to do equity, and would have decreed that the contract should stand as a security to the appellee for the payment of a reasonable compensation for his services. But the appellee is the actor, and the primary object of the bill, all that gives jurisdiction to the court of equity, is the specific performance of the contract. The appellee has a clear legal right to fair and reasonable compensation for his services, but it is a legal demand, of which a court of law has full jurisdiction, and is capable of affording an adequate remedy. It does not spring out of the contract, but is independent of it, and can not justify a decree in his favor in the present suit. A court of equity having jurisdiction of a case, will generally settle the entire litigation, though it may involve the enforcement of legal demands, for which there is an adequate remedy at law. This is true only when the court has jurisdiction of the primary purposes of the bill, and the right to relief in respect to them is shown, and the legal demand is consequent to them. The rule does not apply when the primary objects of the bill fail.—*Pond v. Lockwood*, 8 Ala. 669.

The decree must be reversed, and a decree must be here rendered dismissing the bill at the costs of the appellee in this court and the court of chancery.

[Autrey v. Frieze.]

Autrey v. Frieze.

A Bill to Compel an Account.

1. *Equity will compel an account between tenants in common when one has received more than his share of the property.*—Equity will compel an account between tenants in common, where he has received more than his share of profits and there are complicated matters of account unadjusted between them.

2. *A union of land and stock with personal skill, and labor, and stock, and equality of expenses and profits, make a partnership.*—Parties who enter into an agreement by which one is bound to contribute land and stock for its cultivation, and the other to contribute personal skill and labor and other stock; each to furnish a specified proportion of the food for the animals, to pay equally the expenses of the plantation and to divide equally the crops, are partners and not tenants in common.

3. *Such an agreement may be afterwards modified.*—Persons entering into such an agreement may afterwards modify or rescind it; but a rescission or modification of it cannot be proven by loose declarations or conversations, especially when their subsequent conduct accords with the original contract.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. B. B. McCRAW.

William Frieze and B. P. Autrey made a contract in January, 1871, by which, for the purpose of cultivating a farm together during the year, it was agreed that Autrey should furnish the land; one mule to be used in its cultivation, and forage for the mule; and forage for a mule or horse of Frieze for its support during one-half the time it was employed in making the crop; and Autrey also undertook to pay one-half the hire of laborers necessary to till the land and gather the crop.

Frieze agreed, in consideration of these things, to supply two mules, his own labor, and to pay one-half the expenses of the other laborers engaged in the cultivation of the land and in gathering the crop. It was further agreed that all the crops were to be divided equally between the parties.

In accordance with this contract the crops of corn, oats and fodder were so divided; and of the wheat which was sown by Frieze before this agreement was made, he received two-thirds and Autrey one-third of the crop. Eighteen bales of cotton were produced on the farm. Of this number Frieze sold six bales for the sum of \$525.98, and deposited \$515.95 of the money with Messrs. A. G. & J. A. Storey,

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merchants in Talladega. This sum was, by the direction of Frieze, placed, at Autrey's suggestion, to the credit of Autrey & Frieze. Subsequently each of them prohibited the Messrs. Story from paying any part of the money to the other. B. P. Autrey sold twelve bales of the cotton raised on the said land, but did not account for any part of the proceeds of the sale to Frieze.

In January, 1873, William Frieze filed a bill of complaint in the Chancery Court of Talladega, averring his full compliance with the terms of the contract, alleging only a part performance on the part of B. P. Autrey, and praying "that an account be taken of all the partnership transactions and dealings between himself and respondent Autrey, and an account of the moneys received and paid by the complainant and respondent Autrey respectively, in regard thereto; and that the respondent Autrey be decreed to pay to the complainant what, upon taking the said account, may appear to be due him; and that A. G. & J. A. Storey be required to pay into court the five hundred and fifteen 95-100 dollars, charged to be in their hands on deposit with them by the complainant and respondent Autrey and for such other further and general use as may seem meet," &c.

Autrey, in his answer to the bill, admitted some of the allegations, and denied others. He also demurred to it on the following grounds:

"1. There is no equity in the said bill.

"2. The complainant's remedy at law is plain, adequate and complete."

Messrs. A. G. & J. A. Story admitted the possession of five hundred and fifteen 95-100 dollars deposited with them by Messrs. Autrey & Frieze, and prayed to be relieved from the payment of interest on this sum, and also from the payment of the costs of court.

Upon the final hearing of the cause the chancellor decreed that the complainant (Frieze) was entitled to relief.

TAUL BRADFORD, for appellant.

JOHN T. HEFLIN, for appellee.

BRICKELL, C. J.—It is not material to the equity of the bill, to determine whether the relation between the parties, was that of partners in a joint undertaking in planting during the year 1871, or of tenants in common of the crops produced on the lands of the appellant. A court of equity

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has jurisdiction to compel an account between tenants in common, when one has received a greater share of the profits than he is entitled to receive, and there are complicated matters of account between them unadjusted.—1 Story's Eq. § 466; *Lockard v. Lockard*, 16 Ala. 423; *Darden v. Cowper*, 7 Jones' Law, 210; *Leach v. Beattie*, 33 Verm. 195; *Graham v. Graham*, 6 Monroe, 562; *Wiswell v. Wilkins*, 4 Verm. 137; *Walling v. Burroughs*, 8 Ired. Eq. 61. A tenant in common of a chattel can maintain no action at law against his co-tenant unless the thing is destroyed or converted actually, or in effect,—*Allen v. Hooper*, 26 Ala. 286; *Williams v. Nolen*, 34 Ala. 167.

The case made by the bill, is (if it was conceded that the parties stand in the relation of tenants in common), that the appellant has taken exclusive possession and disposed of, for his own use, a larger share of the cotton crop than he was entitled to receive—that the proceeds of the sale of the remainder of that crop, have been by the mutual assent of the parties deposited with third persons, to await a settlement of accounts between them, and that each has claims for expenses incurred in the cultivation of the crops. The relation between the parties, the existence of mutual accounts unadjusted, presents a case lying within the original jurisdiction of a court of equity, not at all dependent on the necessity for a discovery, or any mere incidental ground of equitable interference.

But it cannot be conceded the relation between the parties was that of tenants in common. There is perhaps no question of greater difficulty, of more frequent occurrence, and more embarrassed by contrariety of judicial decision, than to determine when a contract like that we are considering creates a partnership *inter sese*, or an agency, or employment for services in the one party, or a tenancy in common of the profits or products of a common enterprise. The intention of the parties, is the true criterion in this as in all other contracts. But that intention cannot always prevail, for it may be inconsistent with the rights and obligations the contract confers and imposes. It is difficult to suppose the parties contemplated all the incidents of a commercial partnership—that of unlimited power in either partner to charge the partnership by contract within the scope of the partnership business, and the unqualified power of disposition of the partnership effects. These incidents were not in the contemplation of the parties, and when their contract is construed in the light of the circumstances surrounding them, it is certain if

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their attention had been directed to them, some limitation or restraint on the power of the parties respectively would have been imposed. But while these incidents were not in the contemplation of the parties, it is certain they agreed to have a joint interest in the crops, and to share the profits and losses arising from their cultivation. There was not, and the parties did not intend there should be any property, other than the crops, jointly owned by them. This was not essential to constitute them partners. They did intend, and such is their contract, that the appellant should contribute the use of the land, and of a mule, and the appellee his personal skill and services, and the use of two mules. The forage of these mules was to be provided in particular proportions specified. Labor was to be employed and paid for and other expenses to be incurred. The laborers, and these expenses, were to be paid by them jointly, and in equal proportions. When these were paid, the crops were to be equally divided. There is manifestly a community of interest in profit and loss. Neither partner could claim any specific interest in the crops, until an adjustment and satisfaction of the wages of the laborers, and other expenses incurred in the cultivation and gathering. It was possible these wages and expenses would exceed the value of the crops—unpropitious seasons, floods, or other accidents, against which neither skill nor industry can guard, may have so reduced them in quantity, that their value would not equal, or would fall below the costs of the cultivation. If this had been true, each party was bound to contribute equally to the loss. The appellant would have lost not only the use of the land and of the personal property which was employed in its cultivation, but also one-half of the losses resulting from the excess of the expenses over the value of the crops. The appellee would have lost the one-half of such excess, his personal services, and the use of his horses or mules. Where parties have a joint interest in, and share the profits and losses arising from the use of property or skill, either separately or combined, they are partners. *Champion v. Bostwick*, 18 Wend. 183; *Emanuel v. Draughn*, 14 Ala. 306.

It was competent for the parties to rescind or to modify the original contract. The evidence does not show however a rescission or modification. It may be the appellant was not satisfied with the manner in which the appellee was conducting the cultivation of the crops, and that in response to his complaints, the appellee may have said to him that he could take the crops, and do the best he could with them.

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But the appellee continued to labor in their cultivation, and was recognized and treated as having an interest in them until they were gathered and either divided or sold. Loose declarations of this kind are not sufficient to show a rescission or modification of a contract, when the subsequent conduct of the parties is consistent only with its continuance unaltered in any respect. Whether parties have made, or rescinded a verbal contract must often be determined not only from their declarations, but from their conduct, and their conduct is always material, when it is in interpretation of their declarations.—*Acker v. Bender*, 33 Ala. 230.

We find no error in the record, and the decree of the chancellor is affirmed.

Cox v. Cox et al.

Specific Performance.

1. *In an application for the specific performance of a contract, it should be distinctly averred.*—To sustain a decree of specific performance, the contract sought to be enforced must be clearly and distinctly averred; its terms must be definite and unequivocal, and the proof in support of it clear and unambiguous.

2. *A specific performance will not be decreed unless the consideration of the contract clearly appears.*—Specific performance will not be decreed on averment that land was purchased by complainant and father-in-law for the benefit of complainant and wife, when it does not appear what was the consideration of the promise, or that the purchase was joint as alleged.

3. *A stranger's willingness to pay the vendor to induce him to accept the vendee's offer, gives him no interest in the land.*—The fact that a stranger, knowing that another person intended to purchase land, agreed with the vendor to pay something himself, if the vendor would sell at the price the purchaser was willing to give, does not constitute the stranger a purchaser of the land or give him any interest therein.

APPEAL from the Chancery Court of Etowah.

Heard before the Hon. B. B. McCRAW.

The record shows that in 1864 Thomas J. Cox and Emma O. Nuckolls intermarried. In 1867 Nathaniel A. Nuckolls, the father of Mrs. Emma O. Cox, purchased land, situated in Etowah county, of one J. E. Berry, and paid him, on the delivery of the deed of conveyance, the sum of six thousand dollars. This was the purchase money. Thomas J. Cox, as an inducement to Berry to sell the land for this price, executed his promissory note for one thous-

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and dollars, payable to Berry twelve months after date. This note was not given for any part of the purchase money, and was never paid by Cox, but it was settled by Mrs. Cox after her divorce. The vendor made a deed of conveyance of the land in fee simple to Nathaniel A. Nuckolls. By his permission, Cox and his wife entered upon and occupied the land. During this occupation he made some improvements, but also committed waste. Subsequently the said Nathaniel A. Nuckolls made a will, and devised the land, lying in Etowah county, to his sons, Thomas J. and Nathaniel A. Nuckolls, in trust for the benefit of his daughter, Emma O. Cox. The testator died in 1868. At the January term, 1873, of the Chancery Court of Etowah county, Mrs. Emma O. Cox obtained a decree of divorce, *a vinculo matrimonii*, from Thomas J. Cox; and on the 24th day of March, 1873, the said Cox filed a bill of complaint in the Chancery Court of Etowah county against Emma O. Cox and her trustees, Thomas J. Nuckolls and Nathaniel A. Nuckolls. The complainant prayed that upon the final hearing of the cause "an account might be taken of the amount of money he had invested in permanent improvements on the said plantation; and also the value of complainant's services during the time he devoted to said improvements on said farm, &c., and all the several amounts of money and value of labor charged in his bill, together with the one thousand dollars for which complainant gave his note to the said Berry, with the interest thereon, be made a charge on the said land; and that the complainant be decreed an equal interest in said land, and entitled to an equal amount of the rents, and that an account be taken by the register to ascertain the value of said lands and rents."

After due consideration of all matters contained in the pleadings and proof, the chancellor dismissed the bill of the complainant for want of equity.

WATTS & WATTS for appellants.

FOSTER & FORNEY for appellee.—1. At the time of the purchase of the land, T. J. Cox took no estate, legal or equitable. The note made by Cox as an inducement to Berry to sell the land to Nuckolls, gave Cox no beneficial interest in it. If he had any, after Emma O. Cox became a *feme sole* by divorce, and paid the note, she was subrogated to all rights he could, by any possibility, have had.—Clancy, Husband and Wife, 611–12.

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2. No resulting trust in the land would arise in favor of Cox if, subsequent to the purchase, he paid the note or invested money in improvements on it, because resulting trust must arise at the time of the conveyance.—Willard's Eq. 600; 3 Paige, 390; 2 Johns. 409. In establishing a resulting trust, parol testimony must be received with great caution.—2 vol. Sedg. on Vendors, 393-5 (M. P.) 909-10.

3. The estate of Mrs. Cox in the land is not statutory, but created by the will of Nuckolls, her father.—44 Ala. 341. Consequently the husband is bound to account to the wife for the rents and profits.—Clancy, 351. And no matter how great the separate estate of the wife, the husband must support the family.—1 Hill Ch. Rep. 234.

4. The improvements made by Cox on the land was in the nature of a gift to his wife. If this was done for the purpose of defrauding his creditors, they might subject the property, or its profits, to these debts, but the husband can not.—11 Ala. 386; 2 vol. Sedg. Vend. 402, §§ 38, 39; 17 Ves'sr, 264, 272.

BRICKELL, C. J.—The bill is filed to enforce the specific performance of a verbal contract concerning lands. To support the bill, the contract must be clearly and distinctly averred, and must appear to be definite and unequivocal in all its terms; and if it is not admitted, the proofs of it must be clear and convincing. If the terms of the contract are uncertain, or ambiguous, or not made out by satisfactory proofs, a specific performance can not be decreed. "The reason," says Judge STORY, "would seem obvious enough; for a court of equity ought not to act upon conjecture; and one of the most important objects of the statute of frauds was, to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts."—1 Story's Eq. § 764. The principle has often been asserted in this court, that to entitle a complainant to a specific performance, the contract must be distinctly alleged, and established by clear and definite testimony. If the proofs fail to establish the contract as pleaded, a specific performance can not be decreed.—*Goodwyn v. Lyon*, 4 Port. 297; *Ellis v. Burden*, 1 Ala. 458; *Aday v. Echols*, 18 Ala. 353.

The averment of the bill is that the purchase of the lands was made by the complainant and Nuckolls his father-in-law jointly, and was intended as a joint purchase for the benefit of the complainant and his wife, who were *to be equally inter-*

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ested in said lands. What consideration there was to support the promise of Nuckolls, to whom the lands were to be conveyed, that the purchase should enure to the equal interest of the complainant and his wife, is not averred. Nor does it appear from the evidence that the purchase was joint as averred, or that there was any consideration for the promise of Nuckolls, if any was made. True, the complainant gave his note to Berry from whom Nuckolls purchased, for one thousand dollars, in addition to the purchase-money paid by Nuckolls. This was voluntary on his part, without the request or approbation of Nuckolls, to induce Berry to sell at the price Nuckolls was willing to pay. It was not part of the purchase-money of the lands, and if it had been paid by the complainant, there would be no ground on which he could claim an interest in the lands, or an equity to charge them. But it has not been paid, and so far as he is concerned the note has been paid by the appellee, Emma O., by taking it up, and substituting for it her own note with surety. There was no ground on which the complainant was entitled to a decree declaring that he had an interest in the lands.

It is contended that though the complainant may not have been entitled to a specific performance, he was entitled to a decree for compensation for improvements made upon the lands. Courts of equity will decree compensation for improvements made by a purchaser taking possession under an oral contract which the vendor refuses to perform.—*Parkhouse v. Van Cortlandt*, 1 Johns. Ch. 131. In *Evans v. Battle*, 19 Ala. 398, it was held, that when a voluntary donee, has taken possession of lands under a parol gift, and made valuable improvements, a court of equity will not permit the vendor to reclaim possession without making compensation to the donee. In either case, the contract or gift must be averred or proved. Neither the pleadings nor proofs show a contract or a gift.

Let the decree be affirmed.

[Shield v. Dothard et als.]

Shield v. Dothard et als.*Attachment.*

1. *Substantial defects in an affidavit cannot be amended.*—Defects of substance in an affidavit for attachment are not curable by amendment, and when properly presented by plea in abatement are fatal.

2. *An affidavit in an attachment suit is defective if it does not state the removal was without the landlord's consent.*—An affidavit in an attachment suit for rent is fatally defective if it does not allege that the removal of the crops from the rented premises was without the landlord's consent.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. W. L. WHITLOCK.

James Dothard and William Dothard began a suit against James M. Shield, in the Circuit Court of Calhoun county, on the 26th day of October, 1876. The writ of attachment was based on the following affidavit:

"The State of Alabama, Calhoun county. Before me, G. B. Dauthill, Clerk of the Circuit Court in and for the county aforesaid, personally appeared William Dothard, who, being duly sworn, deposeth: that James M. Shield is justly indebted to the said affiant and James Dothard in the sum of one hundred dollars, allowing all just credits and discounts, and that the said indebtedness is due for rents, and that the said James M. Shield has removed a portion of the crop off the premises without paying the rents; and that this attachment is not sued out for the purpose of vexing or harrassing the said defendant or other improper motives.

"WILLIAM DOTHARD.

"Sworn to before me this 24th day of November, 1876.

"G. B. DAUTHILL, Clerk [L. S.]"

The defendant craved *oyer* of the writ of attachment, the bond, and affidavit, and filed pleas in abatement. The plaintiff demurred to the pleas, and the demurrer was overruled. The plaintiff then joined issue upon the pleas, and, "after argument and inspection of the papers in the cause, the court overruled the said pleas and refused to quash said attachment bond and affidavit." To this action of the court the defendant excepted.

M. F. TURNLEY for appellant.—1. The pleas in abate-

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ment should have been sustained, and the court should have rendered judgment in favor of the defendant.—Rev. Code, §§ 2961–2–3 and 2989; 17 Ala. 314; 6 Ala. 620; 4 Ala. 599; 2 Stew. 16; 9 Port. 218.

2. The defect in the affidavit is matter of substance, and not of form merely, and *cannot be amended*. When an attachment is sued out for rent, and the ground of it is that the tenant has removed a portion of the crop from the premises, the affidavit must state that such removal was *without the consent of the landlord*.

3. The attachment in this case is an attachment in the exact form and words of an attachment for debt under the general attachment law.—Rev. Code 2959, and against the general estate of the defendant, and not against the crop grown upon the rented premises, as the statute requires.—Rev. Code, §§ 2961–2–3.

ELLIS for appellees.—1. In this case the affidavit is in these words: “The defendant has removed the crop, or a portion thereof, without paying the rent.” This is sufficient.—1 Ala. 199; 41 Ala. 271.

2. The attachment laws (Rev. Code, § 2990) must be liberally construed to “advance the manifest intention of the law.” And this cannot be done by driving the plaintiff out of court, without a hearing, on the merits of his case.—44 Ala. 605; 3 Ala. 57; 8 Ala. 171.

BRICKELL, C. J.—A landlord has a remedy by attachment, against the crop grown on rented premises, for the rent of the current year, when, without payment of the rent, and without his consent, the tenant is about removing, or has removed, the crop, or any portion of it, from the premises. Of one of these facts, affidavits must be made by the landlord, his agent, or attorney, and of the amount claimed for rent. It is as essential that the affidavit should negative the consent of the landlord as that it should affirm the tenant was removing, or about to remove, the crop, and an affidavit not negating his consent is wanting in substance. Defects of substance in an affidavit for an attachment are not, under the statute, curable by amendment, and when properly presented by plea in abatement, are fatal.—*Hall & Curry v. Brazleton*, 40 Ala. 406. In this case the court overruled a demurrer to pleas in abatement to the writ, because the affidavit was wanting in the averment that the landlord had not consented to the removal of the crops. But issue being

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joined on the pleas, and tried by the record, they were overruled. In overruling them, the court was in error, and the judgment must be reversed and the cause remanded.

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Action of Trover.

1. *Bankruptcy will cause a dissolution of the partnership.*—A partnership will be dissolved by the bankruptcy of one of its members; and the assignee of the bankrupt becomes a joint owner with the solvent partners, of the property of the partnership.

2. *The transfer of a right of action by the assignee, does not authorize the transferee to sue in his own name.*—The transfer by such an assignee of a mere right of action for the conversion of personal property does not invest the transferee with a legal title; the only effect of the transfer would be to authorize the transferee to sue in the name of the assignee, jointly with the solvent partners, and to receive the bankrupt's share of the amount recovered.

3. *The action of trover must be prosecuted by the person having the legal title.*—The action of trover is not within the influence of the statute which authorizes suits to be brought by a party, having only a beneficial or equitable interest, as distinguished from the legal title. It must be commenced and prosecuted in the name of the party having the legal title.

4. *In an action of trover by partners a plea of bankruptcy of one of them is sufficient.*—In an action by partners for the conversion of partnership property, a plea which avers the bankruptcy of one of them is a good and sufficient plea in bar.

5. *If no exception is reserved, the action is not revisable.*—If no exception is reserved to the refusal of the court to allow the complaint to be amended by striking out the names of one of the plaintiffs, its action is not revisable.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. WILLIAM S. MUDD.

The facts are stated in the opinion.

TULLY R. CORNICK, and W. P. CHILTON, for appellants.

1. The fourth plea is, in substance and in fact, a plea in abatement, and it should have been verified by oath.—1 Chitty Pl. 462–3. The plaintiffs might have treated it as a nullity, and would not thereby have waived anything.—16 Johns. 307; 1 Chitty, 463.

2. The plea in abatement sets up the fact that Joseph H. Jourolman, one of the plaintiffs, has brought suit in the name of J. H. Jourolman. Such a plea is frivolous, and ought to have been stricken out by the court on its own motion.

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3. A bankrupt can purchase anything that may be sold by his assignee, whether an estate in possession or a chose in action.—Bump on Bankruptcy (8 ed.), 160; 20 Miss. 258; 5 Am. Rep's, 548. And the assignee can sell any right of action, the collection of which is jeopardized or delayed. Statutes at Large, § 5064; Bump on Bank. 150–160. And his action in the premises can not be collaterally attacked in the State courts.—10 Bank. Reg. 305; 39 N. Y. 302.

4. Declarations are amendable, and, under leave to amend, the plaintiff has the right to amend the original or file a new one.—3 Port. 415, 422; 9 Ala. 89. The declaration can even be amended after issue joined, and is amendable at any time before final judgment; 23 Ala. 127; 27 Ala. 142; 29 Ala. 623; 25 Ala. 320. Section 2809 of the Revised Code has been construed in the following cases: 26 Ala. 380; 27 Ala. 277, 532; 28 Ala. 623; 30 Ala. 636; 31 Ala. 404, 639, 683.

HARGROVE & LEWIS, for appellees.—1. The fourth, fifth and sixth pleas of defendant are in bar and not in abatement. Chitty Plead. 23–4; 11 Ala. 1002. The pleas are good. Parsons on Partn. 475; 27 Ark. 74; Story on Part. § 483–4; U. S. Review Stat. § 5057; 11 Ala. 932. And no objection to the pleas can be noticed except those assigned in the demurrer.

2. The demurrer to the second replication was properly sustained. The replication admits that after the action occurred McNutt became bankrupt; But sets up a subsequent purchase from the assignee. Even if such purchase could have been legally made, it could not restore his capacity to sue as surviving partner, or in any capacity. He bought, if anything, a mere equitable interest. The legal title of his former interest was still in the assignee.—18 Ala. 286; 116 Mass. 534. The *lex fori* must govern in such cases. 116 Mass. 534. And the pleas show that more than two years had elapsed between the bankruptcy of McNutt and the bringing of this suit.—11 Ala. 932; 8 Ala. 375.

3. The assignee of a bankrupt has only such right and power to dispose of the effects and rights vested in him as the bankrupt had if he had not become bankrupt.—18 Ala. 286. But no sale of such a right of action could have clothed McNutt with the power to bring this suit.—8 Port. 36, 237; 18 Ala. 21.

4. The refusal of the court to allow the plaintiff to amend by striking out the name of McNutt can not be revised in the Supreme Court unless the point had been reserved in a

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bill of exceptions. Moreover, the action of the court was *per se* proper. The suit was in the name of McNutt and J. H. Jourolman, as surviving partners. The only person who could have been substituted for McNutt was his assignee in bankruptcy, and this was not proposed. There was nothing but the *simple motion to strike out McNutt*, which, if allowed, would have changed the character of the action. *Taylor v. Taylor*, 43 Ala.; 38 Ala. 155.

BRICKELL, C. J.—This was an action of trover, commenced by the appellants, McNutt and Jourolman, on the 20th day of September, 1871, as surviving partners of A. G. Jackson, deceased, for the conversion, by the defendants in 1863, of two hundred and eight bales of cotton. Several pleas in abatement were filed, to one of which a demurrer was interposed, and overruled. No judgment was however rendered on either of these pleas, but pleas in bar were subsequently filed, and there was issue joined, a jury and verdict for the defendants. The fourth plea in bar avers that before the commencement of this suit, the plaintiffs had impleaded the defendants in the Circuit Court of Shelby county, for the same cause of action. During its pendency the plaintiff, McNutt, became and was adjudicated bankrupt under the act of Congress of March 2, 1867, establishing a uniform system of bankruptcy throughout the United States. That the fact of his bankruptcy was suggested to the court, and entered of record, and his assignee not appearing and making himself a party, said suit was by reason thereof abated. The plea concludes with an averment of the truth of the suggestion, and that during the pendency of said suit, on the first day of January, 1869, said McNutt was by the District Court of the United States held at Knoxville, in the State of Tennessee, adjudged a bankrupt. To this plea, the plaintiffs demurred, assigning two causes, *first*, that there was no denial that McNutt, *was not now, and was not before the bringing of the suit, the owner of an interest in the claim sued on.* *Second*, that it averred two separate and distinct matters in defence, one in abatement, and the other in bar. The demurrer was overruled, and the plaintiffs replied, that after his bankruptcy McNutt purchased of his assignee, the right and interest in the cause of action, he had originally, and this action was brought with the consent of his coplaintiff, Jourolman, and the personal representative of his deceased copartner, A. G. Jackson. A demurrer to the replication was sustained. The errors now assigned, are, overruling the

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demurrer to the plea in abatement, and to the fourth plea in bar, and sustaining the demurrer to the replication.

1. No injury has resulted to the appellants from the ruling of the Circuit Court on the demurrer to the plea in abatement. If the demurrer had been sustained, the cause could but have proceeded, as it did, to issues on pleas in bar. It is unimportant therefore to pass on the sufficiency of that plea admitting it bad, and that the demurrer was erroneously overruled, it is error without injury which furnishes no ground of reversal.

2. In passing on the sufficiency of the fourth plea in bar, we can consider no other objections than those specifically stated in the demurrer. This is the effect the statute, confining demurrers to matters of substance, and declaring "no objection can be taken or allowed, which is not distinctly stated in the demurrer."—Revised Code, § 2656; Code of 1876, § 3005; *Cotton v. Rutledge*, 33 Ala. 110. If the plea had averred simply the bankruptcy of McNutt, there can be no doubt of its sufficiency as a plea in bar. The action is by partners, for the conversion of partnership property. The right of action resided in the partnership, not in its individual members, consequently all must have joined, or the action could not be maintained. The bankruptcy of McNutt, was a dissolution of the partnership. After the adjudication he ceased to have any power or dominion over the partnership effects, whether resting in possession, or in action. By operation of law, the assignee when appointed succeeded to all his rights and interests, and all future actions for the recovery of partnership property, or on contracts, or choses in action, or the rights of the partnership, must be brought jointly in the name of the solvent partners, and the assignee.—Story on Part. §§ 337, 338; *Lacy v. Rockett*, 11 Ala. 1002. Nor was the plea defective because it did not negative the acquisition by McNutt subsequent to the bankruptcy, of a right or interest in the subject matter of suit. The action is not founded on a contract for the payment of money, but for a tort, and is not within the influence of the statute which authorizes suits at law by a party having only a beneficial or equitable interest, as distinguished from the legal title—it must be commenced and prosecuted in the name of the party having the legal title.—*Stodder v. Grant*, 28 Ala. 416. The legal title passed by the bankruptcy to the assignee and the solvent partners jointly. The assignee had no greater power to transfer it than resided in McNutt, and it is too plain for argument that of a mere right of action

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for the conversion of personal property, he could not have transferred the legal title. The only effect of a subsequent transfer by the assignee was to clothe the transferee with authority to prosecute an action at law, in the name of the assignee, jointly with the solvent partners, and to share in the recovery to the extent to which McNutt was entitled to share. It would not have passed the legal title, devolving on the assignee only by operation of law.—*Leach v. Greene*, 116 Mass. 534; *Camack v. Bisquay*, 18 Ala. 286.

We are not inclined to the opinion that the plea is obnoxious to the objection of duplicity—of stating matter in abatement, and in bar. The pendency of the former suit is averred with the view of showing that prior to, and at the time of the bankruptcy, the subject matter of suit had been turned into a mere right of action, and its existence was the matter of controversy. But if the plea is bad for duplicity that defect is not now available. It is not a defect of substance, but of redundancy, which at common law was reached only by a special demurrer.—*Callison v. Lemans*, 2 Port. 145. It results from what we have said, the replication to the plea was not sufficient, and the court did not err in sustaining the demurrer to it. Its averments show that McNutt, had not a legal title to the cotton for the conversion of which the suit is brought, but that the legal title he once had, resided in the assignee in bankruptcy.

There was no exception to the refusal of the court to allow an amendment of the complaint by striking out the name of McNutt as plaintiff. Without such exception, the action of the court is not revisable. If an exception had been taken, it would not have availed a reversal of the judgment. Jourlman alone could not have prosecuted the action to a recovery. The assignee in bankruptcy having jointly with him the legal title must have been a party plaintiff, and there was no offer to amend by making him a party. Let the judgment be affirmed.

[Vincent, Adm'r, v. Daniel et al.]

Vincent, Adm'r v. Daniel et al.

Settlement of an Administrator's Accounts.

1. *A delinquent administrator should be compelled by the court to settle his accounts.*—When it appears from the records that an executor or administrator is delinquent, it is the duty of the Court of Probate to compel a settlement of his accounts.

2. *A party complaining should show an interest in the estate.*—If the court proceeds on the application of a party complaining, it should distinctly appear that he has an interest and cause of complaint, and is not a mere intermeddler in the affairs of other people.

3. *An administrator failing to appear after citation, is in contempt.*—An executor or administrator who, being cited to make a settlement of his accounts, fails to appear, stands in contempt; and the court may proceed against him by attachment, or may state an account against him. But such an executor or administrator has the right to a vacation of the proceedings by paying the costs of them, and filing his accounts and vouchers for a settlement.

APPEAL from the Court of Probate of Cherokee.
Tried before the Hon. JAMES L. LEATH.

On the 21st day of April, 1875, D. C. Daniel filed a petition in the Court of Probate of Cherokee county, and stated therein that he was interested in the estate of Wiley Vincent, deceased; that Hugh Vincent was appointed administrator of the estate on the third day of November, 1868, and was still its administrator; that the estate was solvent; and that more than eighteen months had elapsed since the grant of letters of administration; and concluded with a prayer that an order be made requiring "Hugh Vincent, as administrator aforesaid, to make a settlement of the said estate." The order was granted. By it, Hugh Vincent was required to file his account and vouchers for a settlement on the 12th day of May, 1875. On that day, he appeared and filed a written statement, duly sworn to, in which he admitted he was the administrator of the estate of Wiley Vincent, and denied that the said Wiley Vincent left any estate, and prayed that the statement should be allowed as a settlement. It was ordered to be filed by the court, and the 16th day of June, 1875, was appointed for "the hearing and passing upon said instrument." The case was continued from time to time until the 23d day of November, 1875, when the said Vincent asked leave to withdraw the written statement heretofore filed by him. His motion was granted upon the pay-

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ment of all the costs incurred, for which an execution was ordered to be issued. The cause was then continued from month to month till the 15th day of June, 1876. On the first day of June, 1876, one James H. Savage filed, in the said Court of Probate, a petition, asserting that he was interested in the said estate, and joining "in the application heretofore made for its final settlement."

On the 15th day of June, 1876, Hugh Vincent appeared in court and "refused to file any account as required by the mandate of the court." Thereupon the court proceeded to state the account of the said Hugh Vincent. After the examination of the account, and "evidence relating thereto," the court made the following decree: "Whereupon it appears, and is shown, that the said administrator has received of the assets the sum of six hundred and twenty-nine 26-100 dollars, and that he is entitled to credit for moneys due the Probate Court, fees and printer's fees, &c., the sum of twenty-six 30-100 dollars, and nineteen 40-100 dollars due probate fees to Bradford, being forty-five 70-100 dollars, leaving a balance due the heirs of the said estate the sum of five hundred and eighty-three 56-100 dollars for distribution among those entitled. It is ordered, adjudged and decreed by the court that the account, as above stated, be and is hereby in all things passed and confirmed, as above stated.

"And it further appearing to the court that D. C. Daniel, as transferee, is entitled as such transferee to one hundred and thirty-two 63-100 dollars, it being ten-elevenths of one share. And that J. H. Savage, as transferee of David Vincent, Jr., one-fourth of the whole amount, and that the heirs of David Tucker are entitled to one-fourth of one-fourth, and each as follows:

"To David Vincent, Jr., the Court decrees the sum of one hundred and forty-five 89-100 dollars, his full distributive share of the said estate of the said Vincent, for which let execution issue for Savage; to Hugh Vincent, this administrator by right of his wife, the court decrees the sum of one hundred and forty-five 89-100 dollars, being their full distributive share of said estate, for which let execution issue; to Malinda Darby and her husband, Wiley Darby, the court decrees the sum of one hundred and forty-five 89-100 dollars, being their full distributive share of said estate, for which let execution issue; to the Tucker heirs, or to ten of them, the court decrees the sum of one hundred and thirty-two 63-100 dollars, it being ten-elevenths of one share in full of their distributive share, for the benefit of D. C. Daniel, as

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transferee, for which let execution issue; to L. L. Cochran, guardian *ad litem* for Tucker minors, the court decrees the sum of thirteen 26-100 dollars, it being the full distributive share of said minor, for which let execution issue; for use of officers of court, the court decrees the sum of forty-five 70-100 dollars, for which let execution issue. It is further ordered that the account, as stated, be filed and recorded."

On the 28th of April, 1876, the court appointed "L. L. Cochran to be guardian *ad litem* for George, Susan, Samuel and Louisa Tucker, minors, heirs of the estate of David Vincent, deceased," and he accepted the appointment in writing.

WATTS & SONS, for appellant.—1. In this case, the court issued no citation after stating the account, but proceeded to render a final decree at once. This was a clear violation of the statute.—Revised Code, §§ 2153, 2154; 6 Ala. 218.

2. No decree could legally have been rendered by the Probate Court in favor of the distributees, without setting forth their names, and consequently the decree in favor of the Tucker heirs, or ten of them, for the benefit of D. C. Daniel, was wrong.—5 Ala. 280; 22 Ala. 673.

3. D. C. Daniel became the transferee of ten-elevenths of one share. A decree was rendered in favor of ten of the Tucker heirs, without naming them, for the use of Daniel. This was error.—20 Ala. 777; 35 Ala. 105. And the decree in favor of the guardian *ad litem* was error.

4. The decree in favor of Darby and wife was wrong.

5. J. H. Savage became entitled to the share of David Vincent, Jr., and yet a decree is rendered in favor of David Vincent. When there has been a transfer of the whole share, the decree should be rendered in the name of the transferee. 35 Ala. 105; 11 Ala. 143; 8 Ala. 552, and 20 Ala. 777.

6. The court should have ascertained the distributees of the estate of Wiley Vincent. This was not done. The application to compel a settlement of the estate was not made in the name of any distributee thereof. It was not shown how the Tucker heirs were entitled to any decree.

7. There was no authority for rendering a decree in favor of the officers of the court.

CARDON & DANIEL, for appellee.

BRICKELL, C. J.—The statutes with clearness and precision prescribe the method of compelling a negligent or refractory executor or administrator to a settlement of his

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administration, and there is no difficulty in pursuing it. If pursued, the judge of probate by a simple recital of the facts on the record will sustain the regularity of the proceedings. The court may *ex mero motu*, and it is indeed its duty to proceed to compel such settlement, when from its records, it appears there is a delinquent executor or administrator. If it proceeds on the application of a party complaining, it should appear he has cause of complaint—that he is not a mere interloper, *putting his fingers in other people's messes*. These proceedings seem to have been commenced on the application of Daniel, stating only that he was *interested in the estate*; but how he had an interest, or how acquired, or any fact showing his interest is not stated. The court should not on such an application have made any order, or issued any process. This is however a mere irregularity, not important as the case now stands and we refer to it, for no other purpose than to remind judges of probate, of the necessity and importance of not entertaining such applications unless they distinctly disclose the nature and character of the interest of the party making them. Daniel doubtless has an interest in the estate, which would authorize him to invoke the compulsory process of the court of probate, against the appellant, and it was due to any orderly proceeding in a court of record, that it should have been distinctly stated.—*Spence v. Savery*, 25 Ala. 723.

The mode of proceeding which the statutes authorize, is a citation to the executor or administrator, who is in default to appear and file his accounts and vouchers, and make settlement. If he fails to obey the citation, he stands in contempt, and the court may proceed against him by attachment, or may proceed to state an account against him. The latter, is the course pursued in the present case, and having been pursued, it was the duty of the court after stating the account to issue a further citation notifying the appellant to appear and file his accounts and vouchers for settlement, or that the penalty of his failure was the passing of the account the court had stated against him, and the rendition of decree thereon.—Code of 1876, §§ 2524, 2527; R. C. §§ 2153, 2156. The executor or administrator has however the right to a vacation of the proceedings, if at any time before final settlement, he appears and files his accounts and vouchers for settlement and pays the costs of the previous proceedings.

The court of probate in rendering, a final decree against the appellant on the day the account against him was stated

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fell into an error. Though the appellant was present, and had refused to file his accounts and vouchers and make settlement, he was entitled to a further day to examine the account stated against him by the court. Or to a further day, at which he could purge himself of all contempt, pay the costs caused by his delinquency, and submitting to the jurisdiction of the court, file his accounts and vouchers for a settlement. The proceedings were *ex parte* as to the appellant, and the statutes intend that he should have full opportunity to relieve himself from them, and become as he ought to be the actor for a final settlement of his administration.

In addition, the proceedings are painfully irregular. Some of these irregularities would not furnish a ground of reversal, and some would be corrected by amendment in this court, the record furnishing the proper evidence. It is apparent Daniel and Savage, each have probably interests as assignees of some of the heirs or distributees of the estate. This appearing the court should have required them to propound their respective interests, of which notice should have been given to the appellant and to those whose interest they claim. If it appeared either was the assignee of the integral share of an heir or distributee, entitled to a decree, then in his favor for such share a decree should be rendered.—*Graham v. Abercrombie*, 8 Ala. 562; *Petty v. Wofford*, 11 Ala. 143; *Smith v. Hall*, 20 Ala. 777; *Simmons v. Knight*, 35 Ala. 105. If a married woman is an heir or distributee, a decree should be rendered in the name of husband and wife for the use of the wife.—1 Brick. Dig. 833. The name of each heir or distributee should be distinctly stated, and for the shares of infants there is no authority to decree in favor of a guardian *ad litem*. If the infant has no general guardian the decree should be in his own name; but if he has such guardian, then in his own name by such guardian.

The decree is reversed and the cause remanded.

Shapard v. Lewis.

Action on an Account.

1. *A judgment by default without service of process will be reversed.*—A judgment by default will be reversed when the record does not show that the defendants were served with process.

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APPEAL from the Circuit Court of Etowah.

Tried before the Hon. W. L. WHITLOCK.

David G. Lewis instituted a suit at the spring term, 1875, of the Circuit Court of Etowah county, against James J. Colt, Bartholomew Boyles, William B. Shapard, B. E. Wells and Hugh Carlisle, partners under the firm name and style of the Alabama and Georgia Contracting Company, to recover twenty-five hundred dollars for work and labor done on the East Alabama and Cincinnati Railroad. A copy of the summons and complaint was served on "Bartholomew Boyles, one of the defendants." At the fall term of the court, the death of Bartholomew Boyles was suggested, and the "cause continued generally." The case was continued for several terms of the court, and on the 13th day of March, 1877, a writ of *scire facias* was issued to Needham Lee as administrator of Bartholomew Boyles, and was duly served upon him on the 10th of April, 1877.

On the 26th day of April, 1877, the following judgment was entered in the said Circuit Court:

"And it appearing to the court that the said Needham Lee is the administrator as aforesaid of said estate of said Bartholomew Boyles, deceased; and it further appearing to the satisfaction of the court that proper process had issued to said Needham Lee, as such administrator of the estate of said Bartholomew Boyles, deceased, of this motion, which has been duly returned executed. It is, therefore, considered by the court that this suit stand revived against the said Needham Lee as administrator and representative of said estate of said Boyles, deceased, and this cause is continued as to him. And James J. Colt, William B. Shapard, B. E. Wells and Hugh Carlisle being solemnly called to come into court and make defence against this suit, come not, but make default. It is, therefore, considered by the court that the plaintiff have judgment against the above named members of the Alabama and Georgia Contracting Company; and because the damages are uncertain, a writ of inquiry to ascertain the damages, is awarded, which is done. And thereupon come a jury of good and lawful men, to-wit: T. Jesse Wayne and eleven others, who being sworn and charged to assess damages, upon their oaths, do say: 'We find for the plaintiff and assess his damages at the sum of one thousand six hundred and forty-two 65-100 dollars.'

"It is, therefore, considered by the court that the plaintiff recover against James J. Colt, William B. Shapard, B. E. Wells and Hugh Carlisle, members of the Alabama and

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Georgia Contracting Company, against which the suit is brought, one thousand six hundred and forty-two 65-100 dollars, the damages assessed by the jury aforesaid, besides the costs in this behalf expended, for which let execution issue."

Brief of W. H. BARNES & SONS, for appellants.—The complaint discloses the individual names of an alleged partnership, doing business under the firm name and style of the "Alabama and Georgia Contracting Company." It does not appear of record that said alleged partnership is or was dissolved. The summons, complaint and the return of the sheriff show service of same, only upon one of the alleged partners, viz.: B. Boyles. A judgment by default was rendered by the court against all the alleged partners individually, only. This judgment was unauthorized.—*Shapard et al. v. Lightfoot*, 56 Ala. 506.

W. B. MARTIN, for appellee.

PER CURIAM.—Reversed and remanded on the authority of *Shapard et al. v. Lightfoot*, 56 Ala. 506—there being no service or appearance by the defendants against whom judgment was rendered.

The South and North Alabama Railroad Company v. Elias J. Seale.

Appeal from the Judgment of a Justice of the Peace.

1. *A case on an appeal from a judgment of a justice of the peace, is tried de novo.*—On an appeal from the judgment of a justice of the peace the trial is *de novo*, and a motion to vacate the judgment because the service of process does not appear is properly overruled.

2. *Amendable defects in a complaint, not brought to the attention of the Circuit Court will not be considered.*—On an appeal, the defects of the complaint filed in the Circuit Court, and not brought to the attention of the court trying the case, will be disregarded by the Supreme Court, if they were such as could have been amended in the Circuit Court.

3. *It must affirmatively appear that charges refused were in writing.*—Unless it affirmatively appears that the charges refused were in writing, the refusal of them can not be revised on error.

APPEAL from the Circuit Court of Shelby.

[South & North Ala. R. R. Co. v. Seale.]

Tried before the Hon. JOHN HENDERSON.

The plaintiff, Elias J. Seale, brought suit before a justice of the peace in Shelby county, against the South and North Alabama Railroad Company, to recover damages for cattle killed by the corporation. A judgment was rendered against the defendant, and it appealed to the next term of the Circuit Court.

On the trial of the case, the defendant moved to set aside and vacate the judgment rendered by the justice of the peace, on the ground that there "was no evidence of any service of process, or any notice given or served upon the defendant, notifying it of the pendency of the suit before the rendition of the judgment."

The court overruled the motion, and the defendant excepted. The defendant demurred to the complaint, and the demurrer was sustained. The plaintiff amended the complaint, and the defendant pleaded not guilty.

The plaintiff was sworn as a witness in his own behalf, and testified "that he was the owner of the stock described in the complaint; and that the said stock was killed on the evening of the 4th of September, 1876, by a locomotive of the mail train on the South and North Railroad, near Teague's Crossing, about one and a half miles south of Calera, in Shelby county, and that the said ox was worth forty dollars, and the said cow was worth twenty-five dollars. The night on which the cattle were killed was a bright, moonlight night, but he could not tell at what hour the moon rose on that night."

One Busby was introduced by the plaintiff as a witness who corroborated his testimony, and said, "that there had been many cattle killed where the plaintiff's stock was killed. It was at a place known as Mud Cut, and that through said cut, going south, there was *up grade*, and that the stock was killed just after the grade began to ascend in said cut; and that for a half mile above said cut, in the direction of Calera, it is either a slight down grade, or level going in the direction of said cut from Calera."

Another witness was sworn, who also stated that the moon shone brightly on the night on which the ox and cow were killed.

The defendant then introduced one Odena, as a witness, who testified that he was an engineer, "and had been engaged in running a locomotive for more than eight years;" that he was in the employment of the defendant, "and remembered all the circumstances of the killing of the plaintiff's stock.

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That on that evening he left Calera, running a locomotive which carried the mail train over the South and North Alabama Railroad, at thirty-eight minutes after 7 o'clock, going south, and that he had gone not more than a mile and a half below Calera, and that just after he entered the said cut he discovered some cattle on the track, and that so soon as he saw them he applied the *air brakes*, reversed his engine and sounded the cattle alarm in quick and rapid succession, until he struck the cattle with his locomotive, and that at that time the moon was just rising, and that the head-light of the engine was burning, and that the peculiar light given at this time produced a semi-darkness, not strong enough to reflect with full force the head-light of his engine. That it was his business to keep a lookout in front of his engine, and that he did not see the stock until he was within fifty feet of them; but that his failure to see them was not because he was not looking out in front of his engine, but it was on account of the peculiar light aforementioned, and the position of the cattle in the cut, there being a slight curve in the cut, and that he saw them just as soon as it was possible for the stock to have been seen from the position he occupied in his engine, and their location on the road." At the time he saw the cattle he was not running "on full schedule speed," but was running on a down grade, "at a tolerably rapid rate."

Another witness, who was not in the employment of the defendant at the time of the trial, corroborated the testimony of Mr. Odena in every material statement.

The plaintiff requested the court to give the following charge, viz.:

"If the jury believe, from the evidence, that the engineer did not use proper diligence in looking along the road, then they must find for the plaintiff, if the damage was the result of such negligence."

The court gave the charge, and the defendant excepted.

The defendant then asked the court to give the following charges, viz.:

"1. If the jury believe, from the evidence, that all was done by the engineer Odena, at the time of the killing of the stock, known to skilful engineers to stop the train, then the jury must find for the defendant.

"2. That, if the jury, from the evidence, are reasonably satisfied in their own mind that all was done by the engineer running the train that killed the stock of plaintiff that could be done to avoid killing them, they must give a verdict for the defendant.

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“4. That, if the jury believe all the evidence in this cause, they must find for the defendant.”

The court refused to give the foregoing charges, and to such refusal the defendant severally and separately excepted.

RICE, JONES & WILEY, for appellant.

JOHN T. HEFLIN, for appellee.—1. Appeals from justices of the peace are tried *de novo*, and must be tried according to their equity and justice, without regard to any defect in the summons or other proceeding before the justice.—Revised Code, § 2772.

2. In an appeal from the judgment of a justice of the peace, it is not necessary that the parties should make up an issue on paper, when the record recites the parties appeared by attorneys, and the cause was submitted to a jury who returned a verdict. The absence of a statement of a cause of action, plea and issue, furnish no ground for the reversal of the judgment.—7 Ala. 351, 675.

3. The charges requested do not appear, from the bill of exceptions, to have been in writing, and the court, therefore, did not err in its refusal to give them.

BRICKELL, C. J.—There was no error in overruling the motion to vacate the judgment of the justice because of a want of evidence of service of process on the appellant. The only defence allowable in the Circuit Court was to the merits of the case.—*McCroory v. Smith*, 1 Ala. 157; *Patterson v. Grace*, ib. 264. The statement or complaint was certainly demurrable. But if a demurrer had been interposed, its defects could have been cured by amendment. In *Thompson v. Pierce*, 3 Stew. 427, it was decided that in the trial of an appeal from the judgment of a justice of the peace, as the statutes intend that the merits only shall be investigated, this court on error, would disregard defects in the complaint, or statement of the cause of action, which could in the Circuit Court be cured by amendment, if by demurrer or otherwise the attention of the court had been called to them.

It is not shown by the bill of exceptions, that the charges requested were in writing; unless it appears affirmatively, that charges were in writing, a refusal of them is not on error revisable.—*Crosby v. Hutchinson*, 53 Ala. 5; *Hollingsworth v. Chapman*, 54 Ala. 7.

Let the judgment be affirmed.

[Bibb, Adm'x v. Freeman et al.]

Bibb, Adm'x v. Freeman et al.

Voluntary Conveyance.

1. *A voluntary conveyance of a debtor is void against existing creditors.* In this State, a voluntary conveyance by a debtor, having property more than sufficient to pay all debts or demands against him, is by presumption of law void as to existing creditors, although no fraudulent intent can be imputed either to the donor or the donee.

2. *A person having a contingent claim is a creditor within the meaning of the statute of frauds.*—A creditor, within the statute of frauds (Code of 1876, § 2124), as to whom a voluntary conveyance is void, is not necessarily one, who has a demand for money which is due, or running to maturity, or who has an existing cause of action. Whoever has a claim or demand on a contract in existence at the time a voluntary conveyance is made, is a creditor within the meaning of the statute. A contingent liability is as fully protected as a claim that is certain and absolute.

3. *A conveyance beneficial to the donor or injurious to the donee is not voluntary.*—A voluntary conveyance is founded exclusively on motives of generosity and affection. If the donor receive a benefit, or the donee suffer detriment as the consideration of the conveyance, the consideration is valuable. However trivial the benefit to the one, or the damage to the other may be, the conveyance is not voluntary.

4. *The damage caused by a breach of covenant of seisin is the purchase-money with interest.*—In a recovery based on a broken covenant of seisin, the measure of damage is the purchase-money paid, with interest.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. NEIL S. GRAHAM.

On the 29th day of December, 1857, Fleming Freeman sold and executed to Joseph B. Bibb a deed of conveyance of twelve hundred and eighty-five acres of land situated in the county of Montgomery. The deed contained the usual covenants of warranty. The purchaser entered upon and took possession of the premises, for which he paid nineteen thousand two hundred and seventy-five dollars.

About the 23d day of November, 1859, one Jesse Boze-man, as the guardian of Daniel Flinn (a minor), instituted a suit in the Circuit Court of Montgomery county against Joseph B. Bibb to recover of him about eighty acres of land held by Bibb under the deed of Freeman. Due notice of the pendency of this suit was given to Freeman; and at the June term, 1868, of the Montgomery Circuit Court, a judgment for the land and damages for its detention, was rendered against Bibb. In September, 1869, Joseph B. Bibb

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made his will and died. By it James M. Newman was named as executor. He accepted the appointment and entered upon the discharge of his duties.

In the meantime Fleming Freeman had become totally insolvent.

For the purpose of recovering damages for the breach of covenants contained in the deed executed by Freeman to Bibb on the 29th day of December, 1857, Newman filed a bill of complaint in the Chancery Court of Talladega county on the 10th day of July, 1872. The complainant sought to set aside the following deeds of conveyances, and to subject the land therein described to the payment of the said damages:

“The State of Alabama, Montgomery county. Know all men by these presents, that I, Fleming Freeman, of the county and State aforesaid, for and in consideration that David H. Remson shall come and abide on my plantation, known as the Taylor plantation, and plant a portion thereof under an agreement made between the said Remson and myself, bearing date with this instrument, and for the further consideration of good-will and affection which I bear to said Remson and his family, give, grant and convey unto said Remson the following described lands, viz.: Southeast quarter of section twenty-two, southwest quarter of section twenty-three, northeast quarter and southeast quarter of section twenty-seven, and northwest quarter and southwest quarter of section twenty-six—all in township sixteen and range eighteen—to have and to hold the same to him, subject to the following conditions and trusts, viz.: During my life I am to have the right to cultivate such portions of said lands as is authorized under the agreement between said Remson and myself as above named. After my death, the said David H. Remson, should he survive me, shall hold the said lands during his life-time for his own use and benefit, and at his death the said lands shall be vested in Caroline N. Remson, wife of said David H. Remson should she then be living, and all the children of the said David H., excepting Charles F. F., and Seaborn W., the oldest children of said Caroline N., for whom other provision has been made. But should the said Caroline N. not be living at the death of the said David H. Remson, then the said lands shall vest in all the children of the said David H. Remson, excepting the said Charles F. F. and Seaborn W.

“And I, Nancy Freeman, the wife of the said Fleming Freeman, for the good-will and affection I bear to the said David H. Remson and his family, do hereby relinquish all

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right of dower in the real estate herein described, and hereby join in this conveyance.

"In witness of all of which, we the said Fleming Freeman and Nancy Freeman have hereunto set our hands and seals this — day of January, 1859.

"FLEMING FREEMAN,
"NANCY FREEMAN."

"The State of Alabama, Montgomery county. By these presents, I, Fleming Freeman, and Nancy Freeman, wife of Fleming Freeman, of the above State and county, do make this codicil to a deed of gift made to David H. Remson, his wife, Caroline N. Remson and children, bearing date January, 1859, and recorded in the office of the judge of probate of said county on the 16th day of May, 1859. One of the considerations of the deed of gift as described above, requires the said Remson to live and abide on the plantation, and to plant a portion thereof under an agreement made between said Remson and myself, said agreement bearing date with the deed of gift, thereby depriving said Remson and family from moving or leaving said plantation, in the event they should think proper to do so. Now, for the purpose of securing the Taylor tract of land, as described in the deed of gift, to the said Caroline Remson and her children by the said D. H. Remson, we do hereby declare all articles of agreement affecting or in the least detrimental to his interest or her interest, null and void, and of no further value, and we do furthermore, in consideration of the good-will and affection which we bear to said Remson and family, give, grant and convey unto Caroline Remson and children, the following described lands as described in the deed of gift to said D. H. Remson and family, viz.: Southeast quarter of section twenty-two, southwest quarter section twenty-three, northeast quarter, southeast quarter section twenty-seven, northeast quarter of southwest quarter of section twenty-six—all in township sixteen and range eighteen—to have and to hold the same during her life, and after her death to the said D. H. Remson's children. It is furthermore expressly understood that this deed of gift is not to take effect until after the death of myself and my wife, Nancy Freeman. In fee simple whereof we have hereunto set our hands and seals, this ninth of May, in the year of our Lord one thousand eight hundred and sixty-four.

"F. FREEMAN, [L. S.]
"NANCY FREEMAN," [L. S.]

[Bibb, Adm'x v. Freeman et al.]

At the time of the execution of the foregoing deeds, the grantor was not in debt, and possessed great wealth.

The chancellor, on the final hearing, dismissed the bill of complaint for want of equity. After the decree, and before an appeal was taken, the complainant died. Mrs. Martha D. Bibb was then appointed administratrix *de bonis non*, with the will annexed. Upon her petition, the suit was revived, and an appeal was taken to the Supreme Court.

BRICKELL, C. J.—The law in this State is settled, that as to existing creditors, a voluntary conveyance by a debtor is by presumption of law, absolutely void, though no fraudulent intent is imputable to donor or donee, and though the donor may have reserved from the conveyance property more than sufficient for the satisfaction of all debts and demands against him.—*Miller v. Thompson*, 3 Port. 196; *Foote v. Cobb*, 18 Ala. 585; *Gunnard v. Eslava*, 20 Ala. 732; *Thomas v. De Graffenreid*, 17 Ala. 602; *Moore v. Spence*, 6 Ala. 506; *Stiles & Co. v. Lightfoot*, 26 Ala. 443; *Huggins v. Perrins*, 30 Ala. 396.

It is equally well settled, that a *creditor* within the statute of frauds, (Code of 1876, § 2124,) as to whom a voluntary conveyance is void, is not necessarily one having a demand for money which is due, or running to maturity, or one having an existing cause of action. Whoever has, or may have a claim or demand upon a contract in existence at the time the voluntary conveyance is executed, is a *creditor* within the meaning of the statute.—*Foote v. Cobb*, *supra*. A contingent claim, is as fully protected, as a claim that is certain and absolute. The covenantee of a covenant of general warranty, who is evicted by a title paramount and outstanding at the time the covenant is entered into, is regarded as a *creditor*, not from the time of eviction, but from the time the covenant was executed; and a subsequent voluntary conveyance, is, as to him, void.—*Gunnard v. Eslava*, *supra*.

In the application of the principle that voluntary conveyances, are, as matter of law, conclusively presumed fraudulent and void as to existing creditors, the definition of a voluntary conveyance must be steadily kept in view. It is a conveyance founded merely and exclusively on a good, as distinguished from a valuable consideration, on motives of generosity and affection, rather than on a benefit received by the donor, or detriment, trouble, or prejudice to the donee. If the donor receives a benefit, or the donee suffers detriment, as the consideration of the conveyance, the consideration is

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valuable, not good merely. However inadequate such consideration may be—however trivial the benefit to the one, or the damage to the other, the conveyance is not voluntary. The inadequacy, is a circumstance which with other facts, may impart an actual intent to hinder, delay and defraud the creditors of the grantor, but it does not change the character of the conveyance—does not convert it into a voluntary conveyance.—Bump on Fraud. Con. 262. The intent of the party making it, determines its validity or invalidity, whatever may be its form, or the consideration it recites. If he intends to *give*, and the donee accepts with knowledge of the intention, the conveyance is voluntary. If he intends to *sell*, and there is a valuable consideration, the conveyance is not voluntary. The true inquiry therefore is, was the transaction in which the conveyance originates, a *gift*, or a *sale*. *Van Wyck v. Seward*, 18 Wend. 386. In this case, a conveyance was made by a father of real estate to his son, requiring the latter to pay his sisters such an amount as the father should decree their portion of his estate. Though the son by accepting the conveyance, became liable to pay the daughters the amount the father should declare, the conveyance was held voluntary. The manifest intent of the donor was to dispose of the lands to and among his children from motives of affection.

After a careful examination of the conveyances made by Freeman, in January, 1859, to Remson, its terms, limitations, and conditions, and a consideration of the cotemporaneous agreement to which it refers, so far as the contents of that agreement are shown by the evidence,—of the relation of the parties, the circumstances surrounding them, when the conveyance was executed, and their subsequent conduct in reference to it, we can discover no substantial ground on which the conveyance can be regarded as a *sale*, and not as a *gift*—as founded on a valuable consideration, and not merely and exclusively on generosity and affection. The element of value, which it is supposed entered into the consideration, freeing the conveyance from the character of voluntary, is that it was made in pursuance of a promise by the donor to give the lands to Remson, if the latter would move from his residence in the county of Talladega, and reside on the lands, cultivating them under the cotemporaneous agreement to which reference has already been made.

It is often a matter of great difficulty, to discern the line which separates promises creating legal obligations, from mere gratuitous agreements. Each case depends so much on

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its own peculiar facts and circumstances, that it affords but little aid in determining other cases of differing facts. The promise, or agreement, the relation of the parties, the circumstances surrounding them, and their intent, as it may be deduced from these, must determine the inquiry. If the purpose is to confer on the promisee, a benefit from affection and generosity the agreement is gratuitous. If the purpose is to obtain a *quid pro quo*—if there is something to be received, in exchange for which the promise is given, the promise is not gratuitous, but of legal obligation.—*Erwin v. Erwin*, 25 Ala. 241. In *Kirksey v. Kirksey*, 8 Ala. 131, a brother-in-law, wrote to the widow of his brother, living sixty miles distant, that *if she would come and see him, he would let her have a place to raise her family*. Shortly after, she broke up and removed to the residence of her brother-in-law, who for two years furnished her with a comfortable residence, and then required her to give it up. The promise was held gratuitous, though the sister-in-law in consequence of it had sustained the loss and inconvenience of breaking up and moving to the residence of the promissor. In *Forward v. Armstead*, 12 Ala. 124, a father residing in this State, promised a son residing in North Carolina, to give him a particular plantation in this State, and slaves, if he would remove to and settle upon it. The son was induced by the promise to break up his residence in North Carolina at a loss, and was put to expense and inconvenience in removing to this State. The promise was declared gratuitous, and that the father could not be compelled to perform it specifically. The inconvenience and loss the son sustained, was insisted on as furnishing a valuable consideration for the promise. But the court said: "It seems to us, that the expense incurred in a removal under such inducements, does not furnish the test whether the engagement is to be considered a contract, instead of a gratuity, because expense, or at least trouble, which is equivalent to it, must always be incurred; but as we have before indicated, the test is, whether the thing is to be *paid* in consideration of the removal, instead of being *given* from motives of benevolence, kindness, or natural affection."

The conveyance refers to the cotemporaneous agreement between the donor and the adult, active donee who was free from disability. It is shown that agreement was in writing, and has been lost. Its terms according to the evidence of the donor, and one of the donees, who are the only witnesses speaking of them, were, that Remson should remain on the

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lands conveyed, and superintend their cultivation, and that of two other plantations, the property of the donor. The fact is not distinctly stated, but it is of necessary inference from the facts stated that each of these three plantations were supplied with hands and every other necessary appliance for cultivation, the property of the donor. To their cultivation, Remson was to contribute no more than his personal services in superintending them. From all three plantations he was to receive one-fifth of the products of cultivation—receiving no more from the cultivation of the lands conveyed, than from the plantations not conveyed. If compensation was intended to be paid him for removing from his home in Talladega to the lands conveyed—for loss and inconvenience sustained in the removal—for personal services rendered, or to be rendered, it was to be derived from the share of the products of the cultivation of the several plantations, to which the agreement entitled him. We can not regard these as forming part of the consideration of the conveyance of the lands.

When the conveyance was executed, Remson was involved in debt, and the donor was of ample fortune. A relationship existed between them, the donor not having probably nearer relatives than Remson and his family, and none so far as is shown, whose condition appealed more strongly to his sympathy. The conveyance does not vest the right to immediate absolute possession until the death of the donor. At his death it confers on Remson a life estate only, with remainder to his wife if she survives him, and all their children except two, *for whom other provision has been made*. The wife of the donor joins in the conveyance for the purpose of releasing her contingent right of dower, and the release is expressed to be in consideration of *good will and affection* borne to said David H. Remson and family. The whole scheme of the conveyance is testamentary. We do not mean to say that it is a will, though it may closely approach it—but it is a disposition by deed from motives of affection, to take effect after the death of the donor. It has all the elements, qualities, limitations and terms to be found in a voluntary conveyance executed by parties sustaining the relations of the parties to it, surrounded by the circumstances surrounding them, and but few, if any, of the elements of a sale between parties contracting on a valuable consideration. We repeat we cannot doubt it was founded on no other consideration than love and affection—that the parties never thought of buying and selling—and that the

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stress of subsequent and unanticipated events, has induced them to suppose that there was some other consideration for it than affection and benevolence. Without closing our eyes to the truth of the transaction—to the motives we irresistibly feel must have actuated the donor, and to the intent of the parties collected from the circumstances surrounding them, we cannot hesitate to pronounce the conveyance voluntary. It is consequently void as against the appellant.

The decree of the chancellor is reversed and a decree here rendered granting the complainant the relief prayed for.

The recovery in this case is based on a broken covenant of seisin. In such case, the measure of damage is the purchase-money paid, with interest.—See Sedg. Meas. of Damages, marg. 170. But the failure of title and eviction being partial, the recovery must be proportioned to the value of the part of the premises to which the title has failed.—Ib. 171. In taking the account, the true measure of recovery is, the proportion which the eighty acres lost bear to the value of the whole tract conveyed, rating the whole value at \$15 per acre. In other words, if the eighty acres was of precisely equal average value with the whole tract, then the complainant's measure of recovery is twelve hundred dollars with interest. In estimating these damages, the value of the eighty acres as a component part of the tract will be taken into the account, and its value graduated accordingly, whether above or below the average.

The action at law which resulted in Bibb's eviction from the eighty acres, was commenced in less than two years after Freeman's sale and conveyance to him. Damages by way of mesne profits were recovered from him, which together with costs and attorney's fees he has had to pay. We will make no order of recoupment for the use and occupation enjoyed by Bibb. For these he has accounted to the rightful owner.

It is referred to the register to take and state an account on the principles above expressed; and he will compute interest on the sum ascertained to be due from the sale to the coming in of the report. He will consult all legal evidence on file, and such other evidence as may be offered—with a right to re-examine witnesses heretofore examined. All other questions are reserved for decision by the chancellor.

STONE, J., not sitting.

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McPherson et al. v. Harris.

Construction of Contract.

1. *A contract should be so construed as to effect the object of the parties.* In the construction of a contract, written or oral, the great object is to ascertain, and if possible, to effectuate the intention of the parties.

2. *A plaintiff is not liable for the expenses of taking care of property levied on under an attachment, when it is released.*—A plaintiff in an attachment suit, who agrees to release the levy on the property attached, and to give an order to the sheriff for its restoration to the defendants, and if any have been sold, to deliver the proceeds also to the defendants, and performs this agreement, does not guaranty the good conduct of the sheriff; and is not liable for the expenses incurred in taking care of the property.

3. *A contract must be construed according to its terms.*—When a contract is expressed in clear and unambiguous terms, it is not legitimate to imply a further and larger obligation.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

The plaintiff, Thomas H. Harris, brought suit to the fall term, 1869, of the Circuit Court of Talladega county, against William McPherson and Moses Hamilton, upon a promissory note. The defendants pleaded in short, by consent, the general issue, with leave to give in evidence any matter that might be specially pleaded. Issue being joined, the plaintiff read in evidence the following note:

\$600.00. Talladega, October 30th, 1867. One day after date, we, or either of us, promise to pay Jacob Perry, as guardian of Mary and Thomas Harris, or order, six hundred dollars, for value received, with interest from January 1st, 1867. This note to stand as to any legal offsets, if any there be, between the parties, as if the same had been executed January 1st, 1867, this being the note agreed to be given according to articles of agreement of January 1st, 1867, promising certain suits therein specified.

WM. MCPHERSON,
MOSES HAMILTON,

The defendants then read in evidence this agreement:

“The State of Alabama, Talladega County. This agreement, made and entered into this, first day of January, 1867, between Jacob Perry, guardian of Thomas H. Harris and Mary F. Harris (now Kirk), and William McPherson, Moses Hamilton and William G. McPherson; witnesseth, that

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whereas the following suits have been commenced, and now pending, in the Circuit Court of said Talladega county, to-wit: One, Jacob Perry, guardian as aforesaid, against said William McPherson and John Sawyer, another, Moses Hamilton and William G. McPherson against N. D. Plowman, sheriff, Jacob Perry and others; another, by Moses Hamilton against the same parties as the last above mentioned. On the first suit above mentioned, an attachment was sued out and levied upon a stock of goods claimed by said Moses Hamilton and Wm. G. McPherson, and also on seven mules claimed by said Moses Hamilton. The second suit mentioned, brought to recover damages for the wrongful levy on said mules. Now, for the purpose of settling said several suits, the parties hereto agree that said Jacob Perry release said levy on said goods, and give to said Hamilton and McPherson an order to the sheriff, requiring him to return to them the said goods, and the said mules having been sold by said sheriff, the said Perry releases to and gives an order to said sheriff, requiring the proceeds of said sale of the said mules to be paid to said Hamilton; and it is further agreed that said Jacob Perry agrees, and hereby binds himself, to give a credit upon his said debt sued upon against said William McPherson and John Sawyer one-half of said debt, and to release said William McPherson on the same, and to look alone to the said Sawyer for the balance of the said debt upon said William McPherson, giving his note, with good and sufficient security, for the sum of six hundred dollars, bearing interest from this date. It is further agreed that the said Moses Hamilton and William G. McPherson are bound, and they hereby bind themselves, to dismiss their said suit, and the said Moses Hamilton is to dismiss his suit; and a compliance with these presents shall be a full satisfaction of all damages claimed in said suits. And the said Jacob Perry hereby binds himself to release said William McPherson from all further liability against him and said John Sawyer, but is to be permitted to retain his said suit, so as to recover the other half of said debt against said Sawyer, but is to look to him alone, and to enforce such recovery against said Sawyer. The promises, as above stated, being fully complied with, may be pleaded, and shall be a bar against the further prosecuting of the said several suits, except as above stated.

"JACOB PERRY,
"WM. MCPHERSON,
"MOSES HAMILTON,
"W. G. MCPHERSON."

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It was admitted that all the orders which Perry had agreed to make or give, had been given to the sheriff, in compliance with the foregoing contract.

Moses Hamilton, among other matters, testified that the goods received from the sheriff on the order of the said Perry, fell short of the proper amount, "three hundred and twelve dollars and some cents,—and that the sheriff refused to give back to witness all the proceeds of the sales of said mules, and that the sheriff took the sum of four hundred and nine dollars of the proceeds of the said sales on account of costs and expenses growing out of said attachment sent."

The plaintiff objected to the introduction of this evidence, the court sustained the objection, and the defendants excepted.

The sheriff offered in evidence the following receipts:

"Received, January 8th, 1867, of Moses Hamilton, of funds of Hamilton & McPherson reserved, one hundred and fifty-six 80-100 dollars expenses for feeding mules, ninety dollars for hauling goods, twenty-two 50-100 dollars house rent due Savory, seventy-five dollars house rent at Fayetteville, fifteen dollars due Puckett for guarding goods, twelve dollars due Puckett for moving goods, forty dollars clerk hire, amounting to three hundred and nine 30-100 dollars.

"N. P. PLOWMAN, Sheriff."

"Received of N. P. Plowman, sheriff, January 8th, 1867, four hundred and seventy-six 84-100 dollars, balance of money due from sale of mules and goods, property of Hamilton & McPherson, after subtracting above named expenses as shown by above receipt.

"MOSES HAMILTON."

To this evidence the defendants objected; their objection was overruled, and they excepted.

LEWIS E. PARSONS, for appellant.—1. The appellee defends the ruling of the court below, on the ground that the testimony of Hamilton tended to vary and change the legal effect of the written agreement made on January 1st, 1867, and mentioned in the note sued on. The interpretation given to the contract is a narrow one. A careful reading of the agreement will show that such an interpretation is neither true nor just. The mules levied on had been sold, and the order given by the appellee was for the proceeds of that sale—the entire proceeds—and not so much of it as might then remain in the sheriff's hands.

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2. Whatever conclusion the court may come to concerning the 'order for the proceeds of the sale of the mules,' it is certain, that under the agreement *all of the goods* which had been seized were to be returned—not a part of them, nor the proceeds of them.

3. There was a failure of consideration, and the appellants should have permitted to have shown it. "The maker of a promissory note may show the failure of consideration, and may therefore prove the contract—the inducement to the making and receiving the note."—2 Ala. 280; 10 Ala. 230; 19 Ala. 203. "Failure of consideration is available as a legal defence in reduction of the sum sought to be recovered. Nor is the rule varied because the defendant could maintain a cross-action for damages in consequence of such partial failure."—42 Ala. 230.

TAUL BRADFORD, for appellee.

BRICKELL, C. J.—The case presents but a single question—the true construction of the contract entered into on the first day of January, 1867, by Jacob Perry, William McPherson, Moses Hamilton and William G. McPherson. In the construction of written or verbal contracts, the great object is to ascertain, and if possible effectuate the intention of the parties. In ascertaining such intention, the court must place itself in the situation of the contracting parties at the time of making the contract, and consider their obvious design as to the purposes to be accomplished.—*Pollard v. Maddox*, 28 Ala. 321; *Bryant v. Bryant*, 35 Ala. 315.

When this contract was made, there were several suits pending between the parties, and the primary purpose was to settle finally the litigation they involved. The suit in which Perry was plaintiff had been commenced by, or an attachment had been sued out in aid of it—which is the fact, is not certainly shown. The attachment had been levied on a stock of goods and several mules as the property of William McPherson. Hamilton and William G. McPherson were not parties to the attachment suit, but claimants of the property levied on, and had sued the sheriff and Perry for its wrongful taking or conversion. "Now for the purpose of settling said several suits," are the words of the contract, "the parties hereto agree that said Jacob Perry release said levy on said goods, and give to said Hamilton and McPherson an order to the sheriff requiring him to

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return to them the said goods ; and the said mules having been sold by said sheriff, the said Perry releases to, and gives an order to said sheriff requiring the proceeds of said sale of the said mules to be paid to said Hamilton." The levy on the goods was released—the order given for their restoration to McPherson and Hamilton, and an order given to Hamilton, for the proceeds of the sale of the mules. The sheriff failed to deliver all the goods on which he had levied, and retained from the proceeds of the sale of the mules, costs and expenses incurred in taking care and making sale of them, and costs and expenses incurred in taking care of the goods. It is insisted Perry is liable for the goods not returned, and for so much of the proceeds of the sale of the mules as the sheriff retained. We can not concur in this view of the contract. There is no word in it, which imports that Perry was to become the guarantor for the good conduct of the sheriff, past, present or future. Nor does it import more than that he would release whatever of claim he had acquired by the levy of the attachment, leaving the sheriff, so far as he was concerned without authority to retain possession of the goods, or the proceeds of the sale of the mules. The levy of the attachment created a lien, which Perry could control, and release or enforce. Withdrawal of the goods, and the proceeds of the sale of the mules from this lien, restoring McPherson and Hamilton to the right to control them, and to possession of them, so far as the right was affected by the lien was all that Perry bound himself to do, and all it was intended he should do. This was to be accomplished by an order to the sheriff to return the goods, and pay over the proceeds of the sale. When the order was given, there was full compliance by Perry with the stipulations of the contract on his part. The parties must have known costs had been incurred in the keeping of the goods, and in the keeping and sale of the mules. If it had been intended these costs should be paid by Perry, there would have been some stipulation to that effect. They would have followed ordinarily the event of the suit he had instituted. A right to continue this suit against Sawyer, one of the defendants to it, who could not be charged with them Perry expressly retains. The only duty imposed on him, is the release of the levy, and an order to the sheriff for the restoration of the goods, and the payment of the proceeds of the sale of the mules. Now it is not consistent with the manifest purposes of the contract to quiet the controversy, to suppose the parties intended that the costs they knew had

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been incurred should remain unsettled. Nor is it legitimate when in clear and unambiguous terms the obligation of Perry is expressed, to imply a further and larger obligation. We think Perry fully complied with the contract on his part when the levy was released, and the orders given to the sheriff. If the sheriff had converted, or failed to deliver any of the goods seized, it was his default, for which he, and not Perry was answerable to McPherson and Hamilton. If he retained for costs, the parties must have contemplated such retainer when the contract was made, and have intended that the order of Perry should be regarded as a direction and authority to pay over, only what Perry could have controlled or received—the balance of the proceeds of sale, after paying such costs.

Adopting this construction of the contract, there is no error in the record of which the appellants can complain, and the judgment is affirmed.

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Action of Ejectment.

1. *Judgments create no liens.*—Judgments create no liens upon the property of defendants. A lien is created only by the delivery of an execution to the sheriff, and extends only to the property subject to levy and sale, which is found in the county.

2. *In the absence of a stipulation the mortgagee is entitled to the possession of the property.*—A mortgage in the absence of express stipulations, or necessary implications, gives the right to immediate possession of the property, and the mortgagee may at any time take possession of it, or recover it by suit.

3. *No presumption will be indulged that the mortgagee is not entitled to immediate possession.*—No presumption can be indulged that the right to immediate possession was withheld, when the debt, for the security of which mortgage was given, was due at the time of its execution.

4. *In civil cases only exceptions reserved, and assigned, and insisted on as error, will be considered.*—In civil cases only such action of the court below as is excepted to, and assigned and insisted on as error in the appellate court, will be considered.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN HENDERSON.

The facts are stated in the opinion.

RICE, JONES & WILEY, for the appellant.—1. An appel-

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lant, who has duly assigned errors, has the legal right to have them examined, considered and decided by this court, whether he argues them or not. This right is given by law, and is not created by or dependent upon his argument.—52 Ala. 480. The appellant had the right to rely, and did rely in taking his exceptions assigning errors, and arguing the cause on the law and practice, as settled in 52 Ala. *supra*.

2. In view of the facts of this case, it seems impossible to hold that the seventeenth charge, given by the Circuit Court, at the request of Parsons, is not a reversible error, without necessarily overruling the law as firmly settled by the court for more than twenty years.—26 Ala. 184, 185; 27 Ala. 336, 337. If these two cases declare the law in Alabama, that charge is clearly erroneous. To sustain the charge is virtually to abolish the settled doctrine of constructive fraud in this State.

3. Although Parsons was a creditor, yet the mortgage to him can not be sustained merely because it was made on a valuable consideration. To sustain the mortgage, it must not only have been for valuable consideration, but also *bona fide*, free from actual or constructive fraud.—3 Ala. 444; 14 Ala. 557; 14 Ala. 55. If Parsons accepted the mortgage with knowledge of Elston's intention to hinder his creditors or delay them, the mortgage is invalid as against Woodward, even if Parsons had no intention to delay, hinder or defraud the creditors of the mortgagor. Such knowledge, without regard to his intention, would make him, in law, a participant in the fraud.—41 Ala. 245. In no just sense is Parsons a purchaser. He parted with nothing when he took the mortgage under which he claims. He is merely a mortgagee, who took the mortgage as security for an antecedent debt. And if, when the mortgage was executed, he had notice of the intention of Elston to hinder, delay or defraud his other creditors, his claim must yield to such creditors, although he did not participate in the purpose of Elston. 2 Ball & Beat. 319-20; 7 Peters, 348. In every point of view, the charge as an erroneous statement of the law, and must work a reversal.—7 Pet. 348.

There are divers erroneous propositions in the first sixteen charges given at appellee's request, which no argument can make clearer than the careful reading of them. And no court can know that, even if there be but one error, the verdict was not the result of it.—53 N. Y. Rep's 180, 184.

The evidence in this case and the legal presumptions arising therefrom shifted the burden of proof from the

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appellant, put it upon the appellee, and required him to furnish explanation of the badges of fraud.—9 Ala. 305; yet, the said charge seventeen steadily kept the burden of proof on appellant as to fraud; and deprived him of the verdict on that issue.—37 Ala. 385.

JOHN T. HEFLIN and GEO. W. PARSONS, for appellee.

1. There is no question so reserved by the bill of exceptions that it can be reviewed in this court. The exception to the general charge given by the court *mero motu* is to the “charge of the court, and to each part thereof.” This is simply an exception to the whole charge, and is too general to raise any point for review.—50 Ala. 181; 50 Ala. 80; 37 Ala. 642.

2. The exception reserved to the seventeen charges of the plaintiff is this: “defendant excepts to each of these charges.” This is general. It is an exception to all the charges collectively, and not to any charge separately. A bill of exceptions, like other pleadings, must be construed most strongly against the party whose pleading it is. The exception being general, the court is not bound to sift the charges to find out anything that is objectionable.—21 Ala. 351; 21 ib. 200; 32 Ala. 690; 1 Ala. 692.

3. Any misdirection in matter of law is, so far as it affects Woodward, is error without injury.—28 Ala. 305; 50 Ala. 265; 28 Ala. 164; 29 Ala. 528.

4. A review of all the laws of Alabama on the subject of judgment liens, from the Code of 1852 down to the present time, shows that at the time the said judgments were rendered under which the appellant claims, there was no such a lien, created by a judgment, as that claimed. At the time of the execution and registration of the mortgage there was no execution in the sheriff's office, and judgment liens were then not known to the law.—28 Ala. 328; 35 Ala. 280; 52 Ala. 601-2.

5. The court, in *Baskins v. Calhoun*, 45 Ala. 582, say: that a judgment rendered in March, 1866, is not a lien on land sold after its rendition, but before an execution was delivered to the sheriff of the county in which they are situated.—44 Ala. 418; 43 Ala. 435.

6. All the judgments were rendered between the 23d of February, 1866, and February 18th, 1868, were not liens, and could not have become liens, until executions were issued. And six days before the issue of executions on said judgments, Elston executed, on the 11th day of June, 1867, a mortgage to Parsons, the appellee, which was duly re-

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corded on June 12th, 1857; and therefore, having been made to secure a large *bona fide* indebtedness, should be satisfied in full before any of said judgments.

BRICKELL, C. J.—This was a real action under the Code, for the recovery of the possession of a tract of land, in which the appellee was plaintiff. Each party deduced title from Jonathan L. Elston. The appellee claiming under a mortgage, executed on the 11th day of June, 1867. The appellants claiming under a sheriff's sale, made under executions against Elston, coming to the hands of the sheriff after, but founded on judgments rendered prior to the execution of the mortgage. The court, at the request of the appellee, gave its charge to the jury in writing, to which general exception was reserved.

In support of this exception, and as showing the charge as an entirety is erroneous, the appellants insist on two propositions: *first*, that under the statutes existing at the rendition of the judgments, a lien was attached to the judgments, which being prior in point of time, has precedence of the mortgage; the *second*, that under the mortgage, the appellee was not entitled to the possession of the premises—that possession of right remained to the mortgagor, until the power of sale in the mortgage had been executed.

The first proposition has been settled adversely to the appellants, by the decision in *Dane v. McArthur*.—57 Ala. 448. The statutes do not attach a lien to judgments. A lien is acquired only by a delivery of an execution to the sheriff, and extends only to property real and personal, subject to execution, situated within the county of the sheriff.

Nor can the second proposition be maintained. The consideration of the mortgage, is the security of debts past due, at the time of its execution. It confers on the mortgagee, the power to sell at any time he may think proper, on giving thirty days notice. In reference to the possession it is silent; there is no stipulation that the mortgagor shall remain in possession until the power is exercised. A mortgage, like other conveyances, deriving operation from our statute of uses, operates an immediate transfer of possession and the right of possession from the mortgagor to the mortgagee, in the absence of an express stipulation, or of necessary implication, that the mortgagor shall remain in possession; and the mortgagee may at any time enter and take possession, or recover it in ejectment.—4 Kent, 183; 2 Wash. Real Prop. 38 (marg. 476); *Duval v. McLoskey*, 1

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Ala. 729. Under what circumstances an implication may be made, of a right in the mortgagor to remain in possession, it is not now necessary to consider. It cannot be made, when the mortgage debt has passed maturity, and the possession of the mortgagor, or of his assignee, would hinder and embarrass the mortgagee in the exercise of the power of sale, with which the mortgage clothes him.

There were seventeen instructions given at the request of the appellee, to each of which an exception was reserved. We have carefully examined these instructions, and though some of them are not clearly expressed, we can not affirm that they assert incorrect propositions, or that their immediate tendency was to mislead the jury. The counsel for the appellant has assailed more particularly the seventeenth instruction. But we think fairly construed, it simply asserts, that the fraudulent intent of the grantor in which the creditor did not participate, would not vitiate the mortgage. The judgment must be affirmed.

Williams et al. v. Roe.

Vendor's Lien.

1. *The land should be accurately described in a bill filed for its sale.*—In a bill filed for the purpose of selling real estate, it is essential that the land should be described with reasonable certainty.

2. *A decree rendered on a bill vaguely describing land, will be reversed.* A description of land as a “part of the east half of the north-east quarter of section thirteen, township seventeen, range two, west, containing about sixty acres, more or less,” is too vague and indefinite; and a decree rendered on a bill having this defect will be reversed.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. CHARLES TURNER.

In February, 1876, the complainant, Francis R. Roe, filed a bill of complaint in the Chancery Court of Jefferson county against Hosea M. Williams, Andrew J. Waldrop, Thomas Gore, E. A. Williams and Mary Truss, to enforce a vendor's lien upon the following tract of land, to-wit: “The east half of the south-east quarter of section thirteen, township seventeen, range two, west; also, a part of the east half of north-east quarter, section thirteen, township seventeen, range two, west, containing sixty acres, more or less; also, the west half

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of the north-west quarter, section eighteen, township seventeen, range one, west." This land was sold and conveyed by Enos T. Vance to Hosea M. Williams on the first day of February, 1872, for the sum of two thousand and five hundred dollars, payable in three equal annual instalments, for which the said Vance took the three promissory notes of said Williams, with said Andrew J. Waldrop as his surety. The promissory note, payable thirty-six months after date, was transferred to the complainant. The first two notes were wholly paid; and the last note held by the complainant had a credit indorsed upon it of three hundred and thirteen 30-100 dollars. Upon this note he brought suit, and obtained judgment for seven hundred and eighteen 15-100 dollars, besides the costs of suit. As the judgment was not paid, the complainant filed a bill for the purposes already mentioned.

On the 11th day of March, 1872, the said Hosea M. Williams and his wife, E. A. Williams, executed and delivered to said Andrew J. Waldrop, an instrument in writing, which was duly acknowledged by all parties, and recorded. By this deed, made for the purpose of securing the said Waldrop from loss, as surety on the said notes, "the said Williams and wife conveyed to the defendant, the said Thomas Gore, as trustee of all of the land above described, and providing that if said notes, or any part of them, should remain unpaid after maturity, then the said lands should be sold by said trustee, if said Vance should require it, and the proceeds applied to the payment of the said notes."

This deed of trust, or mortgage, was, in 1875, assigned to the defendant, Mary Truss, by the said Waldrop, "as collateral security" for the second promissory note given by said Williams and Waldrop to said Vance, and which said note had been transferred to her by the said Waldrop for a valuable consideration.

A demurrer was interposed to the said bill of complaint, which was overruled. And answers were filed, positively denying that the vendor had reserved a lien on the said land for the purchase-money. At the hearing of the case, the court held that the said Vance had waived the vendor's lien. But "the holder of the note given for the purchase-money was entitled to the benefit of the security given to indemnify the surety upon the note and to a foreclosure of the mortgage mentioned in the bill. This equity is superior to that of the defendant's, Waldrop, or any one claiming through him; and consequently the complainant's equity was superior to that of

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the defendant's, Mary Truss, who held merely the interest of Waldrop.

D. S. TROY, for appellants.

PORTER & MARTIN, for appellee.—1. The demurrer was properly overruled.—2 Paige Rep. 396; 4 Paige, 540; 31 Ala. 219. The rulings of the court in 34 Ala. 91, and 38 Ala. 329, are not in conflict with the ruling of the chancellor in this case.

2. Vance and his assignee, Roe, were entitled to all the benefits of the mortgage taken by Waldrop for his indemnity as surety for Williams.—8 Ala. 866; 7 Ala. 362-7; 19 Ala. 779; 33 Ala. 469; 23 Ala. 797, and 2 Ala. 190.

BRICKELL, C. J.—Whether the bill is to be regarded as seeking the enforcement of a vendor's lien, or the foreclosure of a mortgage upon real estate, it is essential that it should describe the lands on which the decree is to operate with reasonable certainty.—*Long v. Pace*, 42 Ala. 495. The decree rendered, must correspond to the pleading. In the present case, a part of the lands are described in the mortgage in the bill, and in the decree, as “a part of the east half of the north-east quarter of section thirteen, township seventeen, range two, west, containing sixty acres more or less.” This description is too vague and indefinite. A purchaser under the decree would not be informed of the lands he was acquiring, nor if it became necessary for the court by a writ of assistance to put him in possession, could it be known for what particular lands the writ should issue. This defect compels a reversal. In all other respects the decree of the chancellor is correct.

The decree must be reversed and the cause remanded.

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Application for Mandamus.

1. *An attorney has a lien on a judgment in favor of the client for his fee.* An attorney at law or a solicitor in chancery has a lien upon a judgment or decree obtained for a client to the extent of the compensation agreed on; or if there be no agreement, to the extent to which, he is entitled to recover reasonable compensation of the client for the services rendered.

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2. *Prior to the statute, there was no legal right to set off one judgment against another.*—Prior to the statutes authorizing a set-off of judgments in courts of law, their interference for that purpose was subject to equitable considerations; and the set-off would not be allowed in violation of the right of an assignee of a chose in action. There was, then, no strict legal right to set-off one judgment against another.

3. *The lien of an attorney is an assignment of the judgment to the extent of his fee.*—The lien of an attorney or a solicitor rests on the theory that he is to be regarded as an assignee of the judgment or decree, to the extent of his fee, from the date of the rendition of the judgment, or decree, and is subject to all set-offs existing against it at the time.

BEFORE the Supreme Court.

The facts are contained in the opinion.

SAMUEL F. RICE, for petitioners.—1. The only important question in this case is as to the petitioners' remedy by *mandamus*. The right to set-off judgments in the same court is a legal right.—Code, 1876, § 2993—and this must be done on motion.

2. If the order overruling the motion to set-off be a final judgment from which an appeal would lie, the remedy is not adequate. It is not enough that a party has another legal remedy to debar him from having a *mandamus*. To have this effect there must be an adequate and specific legal remedy otherwise than by *mandamus*.—7 Port. 47.

3. But the right of set-off in this case is a legal right and the petitioners are entitled to enforce this legal right by legal remedies. An appeal is no adequate remedy; *mandamus* is therefore the proper remedy to enforce their rights.—2 Brick. Dig. 240, § 5.

4. The attorney of Shook could have no greater right than he had, and could give, at the time of the contract. When the contract was made the petitioners already had a judgment against Shook. The assignee of any judgment, Shook might obtain against the petitioners, took it with subject to the petitioners' right of set-off. He would stand "in his shoes." The party seeking the set-off has a legal right older than that asserted by the attorneys.—*Warfield v. Campbell*, 38 Ala. 533, does not militate against this position.

BRICKELL, C. J.—We regard it as settled in this State, by the decision in *Warfield v. Campbell*, 38 Ala. 527, that an attorney at law, or solicitor in chancery, has a lien upon a judgment, or decree, obtained for a client, to the extent of the compensation the client has agreed to pay him; or, if there has been no specific agreement for compensation, to the extent to which he is entitled to recover of the client—

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reasonable compensation for the services rendered. We dissent from, and disapprove the suggestion in *McCaa & Foster v. Grant*, 43 Ala. 262, that the principle stated in this case, "needs limitation, before it can be regarded as settled law, and a rule of decision in all the courts of this State, in the language in which the opinion is announced." The opinion bears on its face, convincing evidence, that it was pronounced on full argument—thoroughly and deliberately considered, after an examination of the authorities, and is fortified by a chain of reasoning which seems to us irresistible. The relation of attorney and client, must have been often formed in view of the principle it announces, and its conclusiveness as authority, ought not to be disturbed or lessened unless it can be shown to be wrong, and that evil and inconvenience result from it.

The precise question now presented, whether the lien of an attorney, or a solicitor, is superior, or subordinate to the right of a defendant in the judgment, or decree, to set-off a judgment against the plaintiff, which the statute secures, was not considered in *Warfield v. Campbell*. The court was considering and passing upon the superiority or subordination to the attorney's lien, of an equitable set-off, acquired by the defendant, after the rendition of judgment, and after the lien had attached. Remarking, that the question now presented, is embarrassed by a singular contrariety of decision in this country, and in England, the court say, there was no necessity for the consideration of it, as the set-off in that case having been acquired after the rendition of judgment, the lien of the attorney must prevail over it, whatever may be the rule as to a set-off existing when the judgment is rendered.

Judgments were not originally within the letter of the statutes of set-off. The practice of courts of common law in setting off one judgment against another, was derived from their general jurisdiction over their suitors. It was as is said by SPENCER, J., in *Simson v. Hart*, 14 Johns. 75, "the exertion of the law of the courts, rather than any known, express, and delegated power." The interference was not *ex debito justitiæ*, but *ex gratia curiæ*. In *Simpson v. Lamb*, 40 Eng. Law & Eq. 63, it was said by ERLE, J.: "An application for leave to set-off one judgment against another is always subject to equitable considerations which courts of law have always regarded in these cases; and the rule has usually been acted upon, not to allow the set-off in violation of the right of an assignee of a chose in action."

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In the same case, it was said by Lord CAMPBELL: "A party has no strict legal right to set-off one judgment against another."—See also, *Holmes v. Robinson*, 4 Ohio, 91; *Burns v. Thornburgh*, 3 Watts, 78; *Boyer v. Clark*, 3 Neb. 161. A suitor applying to the equitable power of the court, to set-off one judgment against another, it may have been equitable and just that the court should consider and protect the right and equity of the attorney its own officer, and have allowed the set-off only for the balance remaining, after the satisfaction of his lien, and this course of practice is perhaps supported by the weight of authority.

The statute of set-off now declares that "judgments in the same court may be set-off against each other, by the court on motion."—Code of 1876, § 2993. The power to set-off judgments is now *known, express, and delegated*. The right of set-off, is *ex debito justitiæ*, a clear legal right, not dependent on the *grace of the court*; and in allowing it, the court can not indulge mere equitable considerations.—*Nicoll v. Nicoll*, 16 Wend. 446. The lien of an attorney, or of a solicitor, rests on the theory, that he is to be regarded as an assignee of the judgment or decree, to the extent of his fees, from the date of the rendition of the judgment or decree. *Warfield v. Campbell, supra*. The assignee of any contract, or writing, the evidence of a debt, other than commercial paper, takes it subject to all set-offs existing at the time of the assignment.—Code of 1876, § 2100.

The relators in a suit commenced by attachment in Etowah Circuit Court, on the 13th March, 1873, on a pre-existing demand, recovered on the 24th September, 1874, judgment against Shook for \$2,357.00, besides costs. On the 24th day of April, 1878, Shook recovered in the same court, judgment against the relators for three hundred and fourteen 60-100 dollars, besides costs. At the same term, at which the latter judgment was rendered, the relators moved to set-off so much of their judgment against Shook, (which was unpaid), as would extinguish the principal (exclusive of costs) of his judgment against them. The attorneys of Shook intervened, and resisted the motion, on the ground that they had a lien on the judgment in favor of their client for their fees, which exceeded the amount of the judgment. The Circuit Court was of opinion the lien was superior to the relator's right of set-off, and refused the motion. The court was in error, and a rule *nisi*, must be awarded requiring the Circuit Court to vacate the order disallowing the

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set-off, or to show cause at the next term, why a peremptory *mandamus* should not issue.

Preiss v. Campbell.

A Bill to Enjoin Sale of Homestead Conveyed by Mortgage.

1. *A mortgage of the homestead prior to April 23d, 1873, is a valid conveyance.*—A mortgage of the homestead, executed by the husband and wife prior to the act approved April 23d, 1873, and acknowledged by both according to the requirements of the statute, is a valid conveyance of the homestead.

2. *Actual occupation of the premises as a homestead is essential to the right of exemption.*—Actual occupancy of the premises as a dwelling-place is essential to the right of homestead; and when the right is asserted to exist in particular premises, the fact must be averred and proven, and it must also be shown that the premises are capable of use as a dwelling-place.

3. *Debts contracted prior to 1868 are not affected by exemptions under the constitution of 1868.*—Under the constitution of 1868 an exemption of a homestead or of personal property can be claimed only against debts contracted after its adoption. Prior debts or liabilities are not affected by these exemptions.

4. *A mortgagor can not enjoin the sale of land not embraced in the mortgage.*—A mortgagor can not maintain a bill to restrain the sale under a mortgage, of land not conveyed by it. The purchaser at the sale could only take the land mortgaged. Such a sale can not cast a cloud on the title of land not included in the mortgage.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. HURIOSCO AUSTILL.

John A. Campbell filed in the Chancery Court of Montgomery a bill of complaint, praying for a writ of injunction against Philip Preiss, restraining him from selling land described in a mortgage which had been assigned to him.

The bill of complaint alleged, that on the 9th day of February, 1871, the complainant and his wife had executed a mortgage of land, therein described, to Matthew C. Stokes, to secure the payment of a bill of exchange. The debt and mortgage had been assigned to the defendant.

Subsequently, the complainant selected a part of the land mortgaged as his homestead. And when, under the power of sale contained in the mortgage, the defendant, Preiss, advertised the premises for sale, the complainant, alleging the foregoing facts in his bill, prayed for a writ of injunction enjoining the sale.

The defendant, Preiss, in his answer, stated that the said

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land was sold on the 20th day of May, 1872, by the sheriff of said county, under judgments rendered against said Campbell. That one of the judgments was in favor of the defendant, and that he purchased the land at said sale, and the purchase-money was applied to the satisfaction of executions on judgments older than his own. After the purchase at the sale the respondent was compelled to buy the mortgage from said Stokes in order to protect his own title and interest in the premises. The defendant also alleged that the sale by the sheriff of said land was made subject to the claim of homestead of the complainant; and "that after repeated delays on the part of said Campbell, and continued efforts by this respondent to compel him to make a selection, Campbell, at last, in November, 1878, selected the lands which are above described as his homestead exemption, and the same were duly allotted to him. More than two years having elapsed since the date of said sheriff's sale, and no offer to redeem any portion of said lands having been made, respondent's title to all of said land, except that embraced in said homestead exemption, having become perfect, he desired by a sale to foreclose said mortgage on that portion of said land embraced in said exemption." The respondent prayed that his answer might be considered as a cross-bill; and also demurred to the bill of complaint on the grounds: "That there is no equity in the bill, and because complainant does not offer to pay into the court the balance of the debt for which, under the facts stated in said bill, said exempt lands are liable."

The court overruled the demurrer, and decreed that the complainant was entitled to relief.

J. W. SHEPHERD, for appellant.

ARRINGTON & GRAHAM, for appellee.

BRICKELL, C. J.—The first point on which we suppose it was intended the equity of the bill in this case should depend has been decided adversely to the complainant in several cases at the last term.—*Miller v. Marx*, 55 Ala. 322; *Coleman v. Smith*, ib. 369; *Weber v. Short*, ib. 311; *Lyons v. Conner*, 57 Ala. 181. Under the authority of these cases, we must hold if the mortgage to Stokes, executed in 1871 (prior to the act approved April 23, 1873), was an alienation of the homestead, being acknowledged by the mortgagor and his wife in the form prescribed by the

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statute for the acknowledgment of conveyances generally, it was a valid and operative conveyance of the homestead.

The remaining question is whether the mortgagor, as against the purchaser of the equity of redemption at sheriff's sale, who becomes the assignee of the mortgage, is entitled to a homestead, and can compel the assignee to foreclose the mortgage, *first*, on the lands not claimed as a homestead, and for the relief of the latter. We do not propose to consider or decide that question, as in our judgment it is not presented by the record. It is a *homestead*; *the home*; around which the constitution and laws throw their protection. Occupancy, actual and in fact of the premises, as a dwelling-place, is essential to the right of homestead; and when the right is asserted to exist in particular premises, the fact must be averred and proved; and it must also be shown the premises are capable of use as a *homestead*, as a *dwelling-place*.—*McConaughy v. Baxter*, 55 Ala. 379.

Neither fact appears from the pleadings or proofs in this case. No occupancy of the premises as a *home*, prior to the issue of the executions and their delivery to the sheriff, when liens attached, is averred or proved. For aught that appears at and prior to that time, the home of the appellee was elsewhere, and he was quickened into activity, in a claim or selection of the premises as a homestead, by the levy and sale under the executions.

The averments of the bill, are, "that orator has selected and claimed as his homestead, under the constitution and laws of Alabama, the following real estate, lying in said county, to-wit: "(describing it), containing one hundred and sixty acres, of which he has been in possession as owner, since November, 1873; and during which time he has held and claimed said one hundred and sixty acres as his homestead exemption," &c. The sale by the sheriff under the executions, was made in May, 1872; and at that time, a homestead of eighty acres only could be claimed as exempt. The act of April 23, 1873, first enlarged the homestead to one hundred and sixty acres; but it could not operate retrospectively, diminishing the rights of purchasers; or of creditors, who had by sales under execution, enforced their existing rights. The claim of a homestead of one hundred and sixty acres, was without foundation. The bill, nor the evidence furnish the basis of a decree for a homestead of eighty acres; the only homestead which in any event, could be claimed by the appellee. No such homestead seems to have been claimed or selected.

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Again, under the constitution of 1868, an exemption of a homestead, or of personal property, can be claimed only as against debts contracted after its adoption. Prior debts, or liabilities, are not affected by these exemptions. It does not appear, either by averment, or evidence, that the debts or demands, on which the executions were founded, were not contracted, or existing prior to the adoption of the constitution of 1868. This fact is also an essential element of the right of homestead, and should be averred, unless from the lapse of time, after the adoption of the constitution, a presumption would arise against the prior existence of the debt.—*Wilson v. Brown*, 58 Ala. 62. As to a small portion of the lands in controversy, described in the bill as “twelve and a half acres in northwest corner of northwest quarter of section thirty-six,” there seems to be a question of fact between the parties, as to whether it is or is not included in the mortgage, the bill alleging that, though advertised for sale under the mortgage by the defendant, it is not in fact conveyed by it, while the answer, denying this averment, states that the tract mentioned in the advertisement as containing twelve and a half acres, and situated in the northwest quarter of that section, is not the tract of similar size, which was expressly omitted from the mortgage and also from the sheriff’s deed. The two descriptions are not identical, and there is nothing in the record which enables us to say that they refer to the same strip of land. But however the fact may be the equity of the bill could not be sustained simply on account of the alleged attempt by the defendant to sell under his mortgage a parcel of land which was not conveyed by it. The purchaser at the mortgage sale would of course get no title, and his deed would not be a cloud on the title to the parcel of land so sold, while the price bid and paid for it would contribute to the payment of the mortgage debt.

The decree of the chancellor is reversed, and a decree must be here rendered dismissing complainants’ bill at his cost in this court and in the court below.

[Murphy v. State ex rel. Egger.]

Murphy v. State ex rel. Egger.

Mandamus.

1. *A writ of mandamus will not be granted if another remedy exists.*—A writ of mandamus will be granted only when the petitioner has a clear legal right, and has no other specific and adequate remedy to enforce it.

2. *If a writ of attachment issue on an unconstitutional law, it will be abated on a proper plea.*—If a statute authorizing the issue of an attachment be violative of the constitution, on a proper plea the attachment will be abated.

3. *If the goods be wrongfully withheld from the owner, an action at law will lie.*—If the possession of goods be wrongfully withheld from the owner, because of the refusal of the plaintiff in attachment to receive them from the bailee of the sheriff, in an appropriate action at law, the wrong may be redressed.

4. *Mandamus will not answer as a plea to a pending suit.*—Mandamus can not be made to answer the office of a plea to a pending suit, nor of an action at law to recover specific property, or for the abuse of process.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN A. MINNIS.

In accordance with “an act to more effectually secure the collection of rents in the city of Montgomery,” approved March 2nd, 1848, John B. Fuller, a justice of the peace of the county of Montgomery, at the instance of Jacob Abraham, issued a writ of attachment against John Egger. The writ was levied on silver and gold watches, clocks and show-cases. Thereupon the defendant filed his claim of exemption. The defendant notified the sheriff that his claim of exemption would be contested.

The defendant did not give any replevy bond subsequent to the attachment. But the property was placed in the hands of one Mitchell, as the bailee of the sheriff. After the lapse of five days, the said Abraham, in accordance with the statute, executed a bond, and immediately thereafter demanded the goods, and the said Mitchell proceeded to deliver the goods levied upon to the said Abraham; “and after he had taken them to his carriage or hack, standing in front of the premises of said John Egger, the said Abraham became dissatisfied with the goods so delivered to him—said that he would not receive them—that he rejected them and went away. Said Mitchell then took possession of said goods as the bailee of the sheriff. The said Egger then demanded of the sheriff the possession of the said goods, who refused to

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deliver them to him. Thereupon Egger filed a petition in the City Court of Montgomery, reciting the foregoing facts, alleging the unconstitutionality of the law under which the attachment was issued, and praying for a writ of *mandamus*, commanding John N. Murphy, sheriff of Montgomery county, to deliver to him, the said Egger, the property levied upon by him under the said attachment.

The respondent, John N. Murphy, sheriff of the county of Montgomery, moved the court to quash the petition on the following grounds, viz.:

“1. The court had no jurisdiction over the matter.

“2. There is no warrant in law for the granting of such a writ in this case.”

The court overruled the motion to quash, and ordered the issue of a preemptory writ of *mandamus*, in accordance with the prayer of the petition, and the respondent excepted to the ruling of the court.

SANFORD & MOSES, for appellant.

GEORGE F. MOORE, for appellee.

BRICKELL, C. J.—The right to a *mandamus* to compel the appellant to restore to the relator, the goods seized under the attachment, seems to be rested on two distinct grounds. The first is, that the statute authorizing the issue of the attachment is unconstitutional. The second, that the plaintiff in attachment had abandoned and waived all claim to the goods by refusing to take them from the possession of the bailee of the sheriff, after having given bond in accordance with section nineteen of the act of February 9th, 1877, (Pamph. Acts, 1876-7, p. 39), for their redelivery to the relator, if the contest of his claim of exemption was not sustained.

It is the mere repetition of a truism, to say, that “the invariable test, by which the right of a party applying for a *mandamus* is determined, is to inquire, first, whether he has a clear legal right; and if he has, then, secondly, whether there is any other adequate remedy to which he can resort to enforce his right.”—*Withers v. State*, 36 Ala. 252. Without considering whether the relator in either of the aspects in which he presents the case, has a clear legal right, it is apparent if he has, that the ordinary remedies afforded by law are adequate to its enforcement. If the statute authorizing the issue of the attachment, is violative of the consti-

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tution, on a proper plea the attachment will be abated. So, if possession of the goods are wrongfully withheld from him, because of the refusal of the plaintiff in attachment to take them from the custody of the bailee of the sheriff, in an appropriate action at law the wrong may be redressed.

Mandamus can not be made to answer the office of a plea to a pending suit, nor of an action at law for the recovery of specific property, or for the abuse of process.

The demurrer to the application was well taken, and the City Court erred in not sustaining it. For the error, the judgment must be reversed, and the proper judgment here rendered sustaining the demurrer, and quashing the application, at the costs of the relator in this court, and in the City Court.

Whorton, Ex'r v. Moragne et als.

Settlement of an Administration.

1. *A court of equity, in the absence of peculiar facts, will not arrest proceedings in a court of probate.*—A court of equity will not, at the instance of an administrator or executor, arrest proceedings commenced in a court of probate, for a final settlement of an administration, unless some specific fact or circumstance is shown, which renders the limited power of that court inadequate to a full and complete settlement of the trusts of the administration.

2. *When a bill is dismissed prematurely, nothing but its equity will be considered.*—When a bill is dismissed for want of equity before the cause was in condition to be heard on its merits, the appellate court will decide no other question than the equity of the bill, because no other was submitted to, and passed upon, by the chancellor.

3. *A court of probate has large powers over the assets of estates.*—The court of probate is invested with a large jurisdiction over the marshalling of the assets of deceased persons, compelling distribution and the payment of legacies. There may be instances in which it is necessary to invoke the larger powers of a court of equity to settle litigation, but such is not the case presented by this bill of complaint.

4. *A court of probate can not, of its own motion, convert an annual into a final settlement.*—When proceedings are instituted and conducted for an annual or partial settlement, the court of probate can not, of its own motion, convert it into a final settlement, and render a final decree.

APPEAL from the Chancery Court of Etowah.

Heard before the Hon. N. S. GRAHAM.

A bill of complaint was filed in the Chancery Court of Etowah county, by B. B. Whorton, one of the executors of

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the last will and testament of William Whorton, for the purpose of obtaining a construction of the will and instructions as to the proper execution of its various provisions. It alleges that the decedent, William Whorton, a resident citizen of Etowah county, made on the 8th day of February, 1850, his last will and testament, and shortly thereafter died in St. Clair county, but in that part of it, which is now included in Etowah. The will was duly probated in the Probate Court of St. Clair county, and letters testamentary were granted to the complainant and Elizabeth Whorton, as executor and executrix in accordance with their appointment as such by the will. They executed bonds and entered upon the discharge of their duties. One Isaac Green, who was also named in the will as an executor, never qualified as such. In 1863 the said Elizabeth Whorton died.

One of the objects of the complainant's bill was to obtain the proper construction of the following clause of the will:

"Whereas, I have heretofore given to my sons, Benjamin B. Whorton and James Madison Whorton, and to my daughters, Louisa Green and Catharine Green, Mary Moragne's heirs, eighteen hundred dollars only, property worth, in my estimation, two thousand dollars each. Now, I will and desire that my wife, Elizabeth, pay to each of my other children, Richard Pinkney, Elizabeth, and Martin Van Buren, the said amount of two thousand dollars each as they become of age or marry, and the heirs of Mary Moragne two hundred dollars to make them all equal; and I further will, and bequeath my property remaining after the decease of my wife, Elizabeth, of all kinds and descriptions, to be equally divided between my said children, Benjamin B., James M., Richard Pinkney, Martin Van Buren, Louisa, Catherine, the heirs of Mary Moragne, share and share equal and alike." The questions suggested to the complainant by the foregoing extract were: "First, whether or not the said two hundred dollars, bequeathed to the Moragne heirs, is a personal trust, confined to the said Elizabeth, or attaches to the executorship of the said estate; and second, as to when it is or was payable, provided it attaches to the duty of your orator, as executor."

The testator died, seized and possessed of a valuable tract of land, lying in what is now Etowah county. And for the purpose of distribution among the legatees in the will, the executor obtained, in 1864, an order of sale from the Probate Court of St. Clair county; and on the 17th day of March, 1864, the said land was sold at auction, to one Joseph

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L. Cunningham, as the highest bidder. The said Cunningham never paid for the land, and the executor filed a bill to enforce the vendor's lien. On the 28th of June, 1874, he obtained a decree to sell the said land for the payment of the purchase-money. In pursuance of this decree, the register sold at public auction, for cash, the said land; and the said executor, as the highest bidder, became the purchaser.

An inventory of the personal property belonging to the estate of the testator was made and returned to the Probate Court of St. Clair county. Under the authority of an order granted by the said court, the personalty was sold on a credit of twelve months; "The terms of the sale were that the purchasers were to pay in Confederate money, or the currency of the country at the time the notes fell due." At the sale the executor bought some of the property. At the same sales James M. Whorton, one of the legatees of said estate, purchased property, and is still indebted to the executor for the articles bought by him. Subsequently to the sale and purchase of a part of the personalty by him, the said James M. Whorton migrated to Texas, and there died, leaving a widow.

The bill alleges that the probate judge of St. Clair cited the executor to make an annual settlement of the said estate. And that in obedience to the said citation, the said executor filed his account for an annual settlement; that this was so advertised, and that "the contest filed by Green and Williams, parties claiming to be legatees, was to the account of" the executor "for an annual settlement." That "no notice was given to the executor either in writing or otherwise that a final settlement and distribution would be made. The evidence and argument of counsel were heard on said settlement, and the court reserved its decision. The executor then retired, and knew nothing of the decree of distribution rendered by the court until long afterwards."

Upon these facts, after praying that process might be issued to the legatees and distributees of the said estate, the executor as complainant, prayed, among other things, that the executor should be required "to file his account before the register for final settlement, and that any interested may contest the same as near as may be, under the rules and practice of the Probate Court in such cases," and that an injunction might be granted "against James M. Moragne, enjoining him from proceeding further to enforce the final settlement of your orator in said Probate Court until the further order" of the Court of Chancery; and "that an

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order be issued to the probate judge of St. Clair county to proceed no further in the matter of said final settlement in the Probate Court of said county until the further order of this court," &c.

On the final hearing of the case, the bill of the complainant was dismissed for want of equity.

JAMES AIKEN, for appellant.—1. It is admitted when the judge of probate has taken jurisdiction of the settlement of an estate, the executor must show some special grounds of equity to remove the case into chancery. This, the bill does in this case. The will is difficult of construction. It is doubtful what interest Mrs. Elizabeth Whorton took in the property—whether the absolute property, or a life estate. 34 Ala. 349, and authorities; 19 Am. Reps. 525; 13 ib. 23; 30 Ala. 404.

2. The legacy to the heirs of Mary Moragne is a *personal trust* conferred on Elizabeth, the co-executrix of appellant. 36 Ala. 153; 41 Ala. 649. She being dead, how is the personal trust to be executed? Does the personal trust attach to the appellant? Must that legacy be paid by the executor out of the assets of the estate? Or must he as executor have nothing to do with it? This is such a difficulty as will justify a recourse to equity.—35 Ala. 235. For this is such a pure *trust* a Court of Probate has no jurisdiction of it.—4 Port. 332; 8 Port. 380; 17 Ala. 214; ib. 170.

3. Another ground of equity is to set off the indebtedness of J. M. Whorton, one of the legatees, to the estate for property bought by him at the sales, against his legacy, he having removed to Texas, and died insolvent.—1 Roper on Leg. 924; 2 Story Eq. Jur. §§ 1434, 1444. What interest Mrs. Mattie Whorton, widow of J. M. Whorton, has in the proceeds of the land for dower in her husband's interest sold by appellant, is also a ground of equity. Is it not proper to bring all the parties before the court, and have these matters settled in one suit?—38 Ala. 35.

4. It is insisted that the settlement of October 17th, 1871, is and was only an *annual one*. That if the decree be final it is fraudulent for the reasons set forth in the amended bill. That it was an annual settlement will appear also from the citation.—Revised Code, § 2141. Under the pleadings in the Probate Court, the judge had no *jurisdiction* except to state the account between the appellant and the estate. He had no authority to decree a distribution.

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No Counsel for appellees.

BRICKELL, C. J.—A court of equity will not, at the instance of an administrator or executor, arrest proceedings commenced in a Court of Probate for a final settlement of an administration, unless some specific fact or circumstance is shown, which renders the limited powers of that court, inadequate to a full and complete execution and settlement of the trusts of the administration.—*Horton v. Mosely*, 17 Ala. 749; *Moore v. Lesseur*, 33 Ala. 237; *McNeil v. McNeil*, 36 Ala. 109; *Park v. Park*, ib. 132. If trusts created by the will, are to be executed; or if there are complicated matters of account, and a discovery is necessary; or if the affairs of the testator or intestate, are so much involved, that he can not safely administer without the aid of a court of equity, it is competent for him to institute a suit bringing all parties in interest before the court, and procure its directions.—1 Story's Eq. § 544; *McNeil v. McNeil*, *supra*; *Gould v. Hayes*, 19 Ala. 438.

2. The chancellor dismissed the bill for want of equity, before the cause was in a condition for a hearing on the merits, and in the absence of necessary parties, if the court should take jurisdiction of the administration. It is improper therefore for this court, on the present appeal, to decide any other question than the equity of the bill; no other having been submitted to, and passed upon by the chancellor.—*Sellers v. Sellers*, 35 Ala. 235.

The will of the testator recites that he had made advancements to several of his children, who are mentioned by name, of the value of two thousand dollars each, and to another, of the value of eighteen hundred dollars, and then proceeds: "Now, I will and desire that my wife Elizabeth pay to each of my other children," naming them, "the said amount of two thousand dollars each, as they become of age or marry, and to the heirs of Mary Moragne two hundred dollars to make them all equal. And I further will and bequeath my property remaining after the demise of my wife Elizabeth, of all kinds and description to be equally divided between my said children, Benjamin B., James M., Richard Pinkney, Martin Van Buren, Louisa, Catherine, the heirs of Mary Moragne, and Elizabeth, share and share, equal and alike." The wife of the testator, the appellant one of his sons, and a son-in-law, are appointed executrix and executors. Mary Moragne is the child of the testator, dying in his life, to whom he had advanced eighteen hundred dollars.

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The first question of doubt or difficulty, in the construction of the will, which the bill suggests, is as to the quantity and quality of the interest taken by the testator's widow, and in reference to this, the advice and direction of the court is sought. There is no averment however, that a controversy exists as to this question; or of the quantity and quality of interest which is claimed by the personal representative of the wife, or by her heirs or next of kin, if a claim is preferred. Nor is such personal representative, if there be one, or the heirs or next of kin, made parties to the bill, so that the court could properly adjudicate the question, if it is embarrassed with doubt and difficulty. The court of probate is invested with a large jurisdiction over the marshalling of the assets of deceased persons, compelling distribution, and the payment of legacies. The jurisdiction necessarily involves that of construing wills, and determining the quality and quantity of interest which passes to devisees and legatees. There may be cases of adverse claims and interests, in which the parties necessary to a final and conclusive adjudication can not be brought before that court and a court of equity clothed with larger powers of bringing before it all parties claiming an interest, would of necessity intervene to quiet litigation. It is possible, if in this case, the bill had averred that there was a controversy between the personal representative of the widow and her heirs, and the executor, and the legatees and devisees in remainder, as to the quality and quantity of the estate taken by the widow, and it had been shown all parties could not be brought before the court of probate, and affected by its decree, a case of equitable jurisdiction would have been presented. But that is not the case made by the bill. So far as is shown, all parties in interest concur, that her estate was limited to her life, and the assets in the hands of the executor are distributable to the remaindermen, according to the terms of the will. If they do concur, it is not for the executor by presenting questions they may regard as unimportant, because their rights and interests are the same, whether the widow had a life interest, or a larger estate, to withdraw the administration from the court of probate.—*Harrison v. Harrison*, 9 Ala. 470.

4. The questions supposed to be involved in reference to the gift of two hundred dollars to the heirs of *Mary Moragne*, the court of probate has full jurisdiction to adjudicate finally, in the proceeding they have instituted to compel the execu-

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tor to its payment, and of consequence there is no ground for equitable interference in reference to it.

5. Without the consent of the personal representative of James M. Whorton, the court of probate would not have jurisdiction to set-off the debt due the executor for purchases of property against the distributive share which may be found due to him.—*Kidd v. Peters*, 13 Ala. 91; *Bondurant v. King*, 15 Ala. 202. It may be that under the facts stated in the bill, a court of equity would have jurisdiction as against the representative of said James M., to set-off the debts due from him against the decree for his distributive share, even after its rendition. That however is an equity between the executor, and such personal representative, with which the other parties in interest have no concern, and which can not be invoked as a ground for equitable relief as against them.

6. The sale of the lands was made under a decree of the court of probate, in the life-time of James M. Whorton, whether the sale was prior or subsequent to the death of Catherine Green, is not shown by the bill; and there can be no intendment that it was prior to her death, if such intendment is necessary to support the equity of the bill. This fact distinguishes the case from *Chaney v. Chaney*, 38 Ala. 35. The personal representatives of these parties alone can recover of the executor the shares of the purchase-money of the lands, to which on settlement, it may be ascertained, they are entitled. Whether the widow of James M. can claim that his share of the purchase-money shall stand in the place of his interest in the land, and she shall be endowed thereof; and whether a similar claim may be made by the husband of Catherine Green, are questions in which the appellant has no interest. These questions can arise only after the personal representatives shall have received the shares of the purchase-money to which their intestates may be entitled, and they are proceeding to administer them.

7. The liability of the executor for his purchases at his own sales, the Court of Probate has complete jurisdiction to determine. If it is ascertained that he should be charged with the actual value of the property purchased, and not with the amount of his bids, made with the understanding that payment should be made in Confederate treasury notes, there is no question of fact, of greater difficulty of solution than such as constantly arise in the settlement of estates.

8. The decree rendered against the executor on the settlement in the Court of Probate, so far as it proceeds to distri-

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bution, was unauthorized and should be vacated on proper application to that court. The proceedings were instituted and conducted for an annual or partial settlement, and it was not competent for the court, of its own motion, to convert it into a final settlement and render a final decree. *King v. Collins*, 4 Ala. 363. On final settlement, while it must be regarded as *prima facie* correct it will be competent for the executor, or for the other parties in interest to show errors in it, which can then be corrected.

We concur with the chancellor, that the bill in its present form, and with the present parties, is without equity. It is probable however, that there are facts and circumstances, which if properly presented, would render it indispensable to the protection of the appellant, and the prevention of injustice that a court of equity should take jurisdiction of the administration. We think therefore the decree of dismissal should have been without prejudice to the right of complainant to file a new bill, and the decree of the chancellor will be here corrected in that respect, and as corrected will be affirmed.

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Action on a Bill of Exchange.

1. *The silence of a party against whom a claim is asserted, may be proven.* The silence of a party against whom a claim or right is asserted, is a fact which may be shown in an action for the enforcement of such claim or right; and from it the jury may infer an admission of the truth of the assertion.

2. *No inference prejudicial to the party can be drawn from his silence relative to the remarks of a stranger.*—But the mere declaration of strangers, with whom the party has no connection, though made in his presence, may be best answered by silence; and from silence no inference against the party should be drawn.

3. *An acquiescence in a falsehood, for the purpose of profit, will avoid a contract.*—A tacit acquiescence in a misrepresentation made by another, the falsity of which is known, or the truth of which a vendor has not a reasonable belief, from which he intends to derive an advantage, may avoid the contract or give right to an action for damages.

4. *A misrepresentation of a material fact will authorize a rescission of the contract.*—A misrepresentation of a material fact by the vendor, on which the vendee relies, and has the right to rely, although made without a knowledge of its falsity, may constitute a fraud on the purchaser, authorizing a rescission of the contract of sale; or furnish a ground of defence to an action for the price, or support an action on the case for deceit.

5. *If the vendor knows the purpose of the purchaser, and represents the prop-*

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erty fit for it, the representation will be an implied warranty.—On a sale of property which is present and open to examination by the purchaser, there is no implied warranty of its fitness for any particular use. But if the vendor is informed that the vendee is buying the property for a particular use, a representation by the seller of its fitness, is an implied, if not an express, warranty.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

This is a suit brought in the Circuit Court of Montgomery county by Nelson W. Perry, to recover the amount due on a bill of exchange drawn by William H. Johnston, William Johnston and W. W. Screws, the defendants.

On the trial, "the plaintiff read in evidence the bill of exchange described in the complaint, and protest thereof for non-payment."

The defendant, William H. Johnston, testified that the bill of exchange "was given for a Jersey bull, named Jesse, purchased by him from William H. Roberts, the payee in said bill, on the 23d day of November, 1872, for five hundred dollars; that said Roberts had the bull on exhibition at the fair held near the city of Montgomery, and stated that he was a good breeder, and of imported stock, and was out of the finest animals of his kind in the United States. Colonel Wilson, of Mobile, in the presence of Roberts, represented that Jesse was a very superior animal for breeding purposes, and spoke highly of his qualities. He (Johnston) told Roberts he wanted him for immediate use as a stock bull. Roberts and Johnston came to the city of Montgomery, and the trade was closed for Jesse at the price of five hundred dollars—the forty dollars added was for interest. A day or two after the purchase, Jesse was taken to defendant's plantation, in this county, and on the second day after arriving there, he went to one or two cows, and from time to time afterwards he went to a number of other cows, but none of them proved to be with calf by him; that Jesse was fat and apparently in fine condition when purchased, and continued to look well and eat heartily for some months, but afterwards Jesse began to pine away, and died in February, 1873. A *post mortem* examination of Jesse was had, and it was found that his heart was enlarged to several times the natural size, and was filled with water. No other appearance of disease was discovered."

Defendant Screws testified that he had signed the bill of exchange, and that in September, 1873, a notice was published that the consideration of the bill had failed, "and it was admitted that the plaintiff did not acquire the bill from

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Roberts in due course of trade without notice, the said bill having been protested for non-acceptance before he acquired it."

The deposition of B. Wyche Walker was then introduced by the defendant, which with other matters, stated that he "advised Johnston not to buy him, and Colonel Wilson, I think it was the man who had him in charge, overheard me, and said to Johnston that he would guaranty him all right and ready for immediate use." To this part of the deposition the plaintiff objected, but the objection was overruled, and the plaintiff excepted to this action of the court.

The court charged the jury: "Was there a misrepresentation made by the owner to the purchaser, at the time of the purchase, that the bull, Jesse, is a good stock bull—good for breeding purposes? If such representations were made, and and the purchase of the bull, Jesse, was on account of them, then, if you find from the evidence that the bull, Jesse, was in fact not a good stock bull, and not good for breeding purposes, the plaintiff should not recover."

To this charge the plaintiff excepted, and asked the court to give the following written charge.

"If the jury believe from the evidence that Roberts had the bull, Jesse, on exhibition at the agricultural fair, and while so on exhibition at the fair, the defendant negotiated for his purchase, and that pending said negotiation Roberts stated to defendant that the bull had always been successful in getting calves, and that subsequently the defendant, Johnston, in the city of Montgomery, relying on these representations by Roberts, purchased the bull from Roberts, without any express warranty of his qualities; and the jury further find that the representations by Roberts, as to the qualities of the bull, were made in good faith, these representations would not constitute a warranty of the qualities of the bull, and the fact that the bull did not come up to the representations, would constitute no defence to this action." The court refused to give the charge, and the plaintiff excepted.

D. S. TROY, for appellant.

WATTS & SONS, and J. T. HOLTZCLAW, for appellee.—1. If any portion of the testimony objected to was legal, the court might properly overrule the objection. It was the duty of the objector to separate the illegal part, and to object to that alone. Wilson had the bull in charge, and made the

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remark in Roberts' presence, and as his agent: If the language had been made use of by Roberts, it certainly would have been competent evidence.—29 Ala. 346.

2. The charge stated the law correctly. Johnston wanted the animal as a bull, and not as beef. It was a bull, and not as beef, that Roberts sold the animal. As a bull, he was useless.—Chitty Cont. p. 391-2, and note 1; ib. p. 393, and note 1; 1 Parsons' Cont. p. 462-3-4-5; Benj. on Sales, p. 543.

3. Any distinct assertion of the quality, made by the owner during the negotiation for sale, of a chattel which it may be supposed was intended to cause the sale, and did cause it, will be regarded as a warranty.—1 Parsons' Cont. 462-3; 8 Port. 133; 2 Ala. 386; Chitty Cont. pp. 393-4.

BRICKELL, C. J.—The silence of a party against whom a claim or right is asserted, is a fact which may be shown in an action for the enforcement of such claim or right; and from it the jury may infer an admission of the truth of the assertion.—*Watson v. Byers*, 6 Ala. 393; *Wheat v. Croom*, 7 Ala. 349; *Hicks v. Lawson*, 39 Ala. 90. The rule is said to rest "on that instinct of our nature, which leads us to resist an unfounded demand." The common sense of mankind is expressed in the popular phrase, *silence gives consent*, which is but another form of expressing the maxim of the law, *qui tacet consentire videtur*. The rule involves as facts on which it rests, that it is the interest or duty, of the party to whom the declaration or assertion is made, to, reply to it. If it proceeds from one having, or asserting, or authorized to assert, adverse interests or claims, it is in the ordinary course of human conduct, if the truth of the assertion is not admitted, that dissent from it should be expressed. Or, there may be circumstances under which, it would be a duty to dissent, if silence would mislead, and produce injury to others, who may rely on the truth of the assertion. The mere declarations of strangers, with whom the party has no connection, though made in his presence, may be best answered by silence, and from silence no inference against the party should be drawn. "The mere silence of one," says Mr. Greenleaf, "when facts are asserted in his presence, is no ground of presuming his acquiescence, unless the conversation were addressed to him, under such circumstances as to call for a reply."—1 Green. Ev. § 197a. In *Jelks v. McRae*, 25 Ala. 440, a slave's confession of larceny, made in the

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presence of the master, and in reference to which he was silent, was held inadmissible as evidence against him. In *Fuller v. Dean*, 31 Ala. 657, which was an action of slander, the defendant offered evidence showing that prior to the speaking of the slanderous words, another person had made the same criminal charge against the plaintiff, and it was not denied. This court said: "We can see no principle on which this evidence was admissible, unless it be under the influence of the maxim, *qui tacet consentire videtur; an admission inferred from acquiescence in the verbal statements of another*. . . . Now, we do not think the charge made in this case was of a nature to call for a reply; but in the language of Mr. Greenleaf, we think it was impertinent, and best rebuked by silence."

If it is admitted that the presence of the vendor, at the time of Wilson's declaration, satisfactorily appears, we do not think the declaration was of a nature to demand any response, and consequently, that acquiescence in it, is not inferrible from silence. At best, it was but an expression of opinion as to the soundness of the animal, strengthened by an avowal of willingness to be personally responsible, or in the language employed, to guaranty its truth. Such responsibility, it is readily conceived he may have been willing to assume, and yet the vendor unwilling to incur. And the vendor may well have been indifferent whether it was assumed or not. It would be a rigid and hard rule, embarrassing sales, if a vendor was bound to answer every impertinent declaration in reference to the thing sold, made by strangers in his presence, or consent to be bound by it. Or, if he was bound by declarations made by those, having all the opportunities of knowledge he may have, and yet may not be as prudent as he is, in its commendations, or in representations of its quality, or value, or condition. Men, ordinarily are bound only by their own conduct or declarations, or the conduct or declarations of those whom they have authorized to act, or to speak for them, and not by the acts or words of mere strangers. The marked distinction between this case, and *Atwood v. Wright*, 29 Ala. 346, is, that the declarations admitted in evidence in that case, were of the auctioneer made in the presence of the vendor, and who was regarded as his agent. There is an absence of evidence having a tendency to show, that Wilson had authority to sell, or to warrant the animal, or to act or speak for the vendor. There may be a fraudulent representation without

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actual declaration from the party making the contract. A tacit acquiescence in a misrepresentation made by another, the falsity of which is known, or of the truth of which, a vendor has not reasonable belief, from which he derives and intends to derive advantage, may avoid the contract, or give claim to an action for damages, as if the words had been spoken by him.—*Pilmore v. Hood*, 5 Bing. N. C. 97; Story on Sales, § 165. But he must act upon such representations, and must have knowledge that the party with whom he is dealing relies upon them.

The law is now settled in this State, in opposition to the earlier authorities, that a misrepresentation of a material fact by the vendor, on which the vendee relies, and has the right to rely, although made without a knowledge of its falsity, may constitute a fraud on the purchaser, authorizing a rescission of the contract of sale, or if there is no rescission, furnishing ground of defence to an action for the purchase-money, or may support an action on the case for deceit.—*Munroe v. Pritchett*, 16 Ala. 785; S. C. 22 Ala. 501; *Atwood v. Wright*, 29 Ala. 346; *Blackman v. Johnson*, 35 Ala. 252. This is the proposition stated in the affirmative charge of the Circuit Court. But if on the discovery of the fraud, the vendee does not rescind, or offer to rescind the contract of purchase, he cannot avoid the payment of the purchase-money *in toto*—he is entitled to a reduction of it to the extent only of the injury he has sustained. If he retains the property, he must pay its value.—*Barnett v. Stanton*, 2 Ala. 181; *Hogan v. Thorington*, 8 Port. 428; *Marshall v. Wood*, 16 Ala. 812. The error of the instruction is, when construed in connection with the evidence, that it authorized a verdict for the defendants, though there had been no rescission, and they had retained the animal which the evidence tended to show was of some value.

The charge requested was properly refused. It is doubtless true, as a general rule, that on a sale of an existing thing, which is present and open to the inspection and examination of the purchaser, there is no implied warranty of its fitness for any particular use.—*Deming v. Foster*, 42 N. H. 174. But if the vendor is informed, the vendee is purchasing the thing for a particular use, and its fitness for that use, is the element of value to the purchaser, a representation by him of its fitness is an implied, if not an express warranty.—Story on Sales, § 371. The charge also rests the responsibility of the vendor for the truth of his representa-

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tions, on his good faith in making them. The principle which runs through our decisions, is the falsity of the representation, and the consequent injury to the purchaser who relies on it, however innocently it may have been made.

For the errors pointed out, the judgment must be reversed and the cause remanded.

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Habeas Corpus.

1. *The sentence of a court must be strictly obeyed by the officer charged with its execution.*—A prisoner convicted and sentenced by a court of competent jurisdiction to perform hard labor for the county during a specified term, can not be punished by a confinement in jail for such a period.

APPEAL from the Court of Probate of Coosa.

Tried before the Hon. JOHN S. BENTLEY.

On the 16th day of November, 1877, William Pearson made to the Hon. John S. Bentley, judge of probate of Coosa county, the following application for a writ of *habeas corpus*, viz.:

“Your petitioner, William Pearson, respectfully represents to your Honor, that at the fall term, 1877, of the Circuit Court of Coosa county, he was indicted and tried on an indictment for arson in the third degree.” (Here follows a copy of the indictment, which is in the form prescribed by the Code.)

“Your petitioner further represents, that upon the said trial he was, by the verdict of the jury, found guilty of the offence charged in the said indictment, and thereupon the following sentence was pronounced, and the same was entered up, and is now the judgment of the court in said cause, viz.: ‘The State, No. vs. 766, William Pearson. On this, the 20th day of October, 1877, it being the sixth day of the term, came the State, by its solicitor, and also came the defendant in person and by attorney, and for plea, says that he is not guilty. And thereupon came a jury of good and lawful men, to-wit: Thomas Mitchell and eleven others, who being duly

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empanelled and sworn,' say: 'We, the jury, find the defendant guilty, as charged in the indictment.' It is therefore considered by the court that the defendant be sentenced to hard labor for the county for a term of twelve months; also, for an additional term until the costs of this suit are paid, at the rate of twenty-five cents per day.'

"Your petitioner further represents unto your Honor, that at the time he was tried and convicted, the Hon. J. E. Cobb, who was the presiding judge, informed the sheriff in open court, as is usual in such cases, that the defendant, this petitioner, was then in his custody. Whereupon, the sheriff committed petitioner to jail, and the petitioner has ever since been, by the sheriff, confined in the jail of Coosa county, and is now in confinement in said jail, under said order and sentence, and has not been put to hard labor for the county, as directed by said sentence and order.

"Your petitioner further represents, that the Commissioners Court of Coosa county did, at the April term, 1875, of the said court, make the following order with reference to convicts sentenced to hard labor for the county, viz.:

"Regular term, April 5th, 1875. It is ordered by the court that the acting sheriff of this county be, and he is hereby, appointed superintendent of public labor, and that all persons sentenced to hard labor by any of the courts of this county, shall be under his control; and it is further ordered, that said sheriff be, and he is hereby, directed first, to hire such persons out to any responsible persons who will secure fine and costs aforesaid against persons sentenced to hard labor, by the payment of the same in money, or by such security as will secure the payment of the same punctually, and in the event more than one person wants to hire one or more convicts, the hiring may be to the highest responsible bidder, and any order of this court heretofore passed regulating hard work be, and the same is hereby, revoked.'

"Your petitioner further states, from information, that there is no other order or arrangement made by said Commissioners Court, than the order above recited, for the purpose of hiring out at hard labor county convicts in this county. Petitioner states, from information which he believes to be true, that he is illegally confined in the jail of this county by the sheriff; that he is not held by the order of any court by said sheriff, and his detention and confinement in the jail of Coosa county is wholly without authority of law; that the sheriff, J. T. Thompson, upon demand made

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upon him for cause or process upon which petition is held in confinement, stated that he had lately come into the office of sheriff of Coosa county, and since the conviction and sentence of the petitioner as aforesaid; that he found petitioner there, but had no writ, or process, or order for his detention, other than the outgoing sheriff informed him that he had been sentenced as stated in the order of the court mentioned in this case. Hence, petitioner states that there is no other cause for his confinement in said jail by said sheriff, than said sentence and judgment.

"Petitioner again states from information which he believes to be true, that he is illegally restrained by said J. T. Thompson, and that his confinement by said J. T. Thompson as sheriff of Coosa county is without authority of law. He, therefore, prays that a writ of *habeas corpus* issue by your honor, directed to J. T. Thompson, commanding him to produce the body of petitioner, together with the cause of his detention, on Wednesday, 28th day of November, 1877, at Rockford, and that upon the hearing, your honor will make an order discharging petitioner from the custody of said J. T. Thompson, and from further confinement in the county jail of Coosa county, under the order of the Circuit Court herein set out, and as in duty bound he will ever pray," &c.

The judge of probate granted the writ of *habeas corpus* as prayed for, and made it returnable before himself on the 28th day of November, 1877. Upon the hearing of the case it appeared that the solicitor had been duly notified of the application for the writ; and all the facts alleged in the petition were clearly proven.

The court, "after carefully hearing the evidence and duly considering the same, together with the argument as to the grounds for the discharge asked in this case, it is ordered and adjudged that the petition of the said William Pearson be dismissed, and that the said J. T. Thompson; as sheriff and jailer, has the legal custody of the said Pearson, and that he retain him in his custody until he or the Court of County Commissioners, or some one else authorized by said court, shall put the judgment and sentence of the Circuit Court into execution by putting the said Pearson to hard labor for the county. To which judgment and order the petitioner excepted."

No Counsel for the appellant.

[Ex parte Pearson.]

JOHN W. A. SANFORD, Attorney-General, for the State.

PER CURIAM.—A majority of the court (MANNING, J., dissenting) are of opinion, not without much hesitation and doubt, that the petitioner is entitled to discharge from further imprisonment. The judgment of the probate judge must be reversed and writs of *habeas corpus* and *certiorari* will accordingly issue, unless the judge of probate, on being properly informed of this opinion, shall make an order, relieving the petitioner from further imprisonment.

INDEX.

ACCOUNT.

1. *Equity will compel an account between tenants in common when one has received more than his share of the property.*—Equity will compel an account between tenants in common, where he has received more than his share of profits and there are complicated matters of account unadjusted between them.—*Autrey v. Frieze*, 587.
2. *A jury must ascertain the amount due on an account.*—A judgment taken by default on an account, without the intervention of a jury to ascertain the amount of damages, will be reversed.—*Rhea v. Holston Salt Co.* 182.
3. *A judgment by default without service of process will be reversed.*—A judgment on an account by default will be reversed when the record does not show that the defendants were served with process.—*Shapard v. Lewis*, 606.

ACTION.

1. *Money paid under a parol contract for the purchase of land may be recovered.*—An action lies to recover money paid under a parol contract for the purchase of land, when the purchaser has not been placed in possession of the land under the contract.—*Flinn v. Barber*, 446.
2. *The falsity of the facts stated in the affidavit must be alleged.*—In an action to recover damages for the wrongful suing out of an attachment, the plaintiff must aver the falsity of the particular fact or facts which are stated in the affidavit as the ground of the attachment.—*Durr et al. v. Jackson*, 203.
3. *An employee can maintain action for damages against employer when in fault.*—An employee, who is injured in the course of his service, has recourse against the employer for damages when the injury is caused by the fault of the employer; but not, when it is caused by the fault or negligence of another employee, unless the employer is chargeable for the employment of an incompetent person.—*Mobile & Montg. Railw. Co. v. Smith*, 245.
4. *An action of trespass can not be changed by amendment.*—An action of trespass can not be changed by an amendment of the complaint into a special action on the case.—*Mobile & Montgomery Railway Co. v. McKellar*, 458.
5. *The distinction between action on the case and trespass is preserved.* The Code preserves the distinction between an action on the case and an action of trespass.—*Pruitt v. Ellington*, 454.
6. *Trespass is the remedy for a tort intentionally committed with force.* If a tort be intentionally committed with force, the immediate consequence of which is injury, trespass is the appropriate remedy; If on the other hand, the injury proceeds from mere negligence, case is the proper action.—*Ib.* 454.
7. *Trespass is not the remedy for an injury caused by negligence.*—Under a count in trespass, evidence of an injury resulting from the negligence of the defendant will not authorize a recovery.—*Ib.* 455.

ACTION—*Continued.*

8. *In an action against an officer, the actual injury is the measure of damages.*—In the absence of a statute inflicting a greater penalty, it is a general rule, in an action against an officer for neglect or other misconduct, the actual injury sustained is the measure of damages.—*Gay v. Burgess, et al.* 575.
9. *The action of trover must be prosecuted by the person having the legal title.*—The action of trover is not within the influence of the statute which authorizes suits to be brought by a party, having only a beneficial or equitable interest, as distinguished from the legal title. It must be commenced and prosecuted in the name of the party having the legal title.—*McNutt et al. v. King et al.* 597.
10. *In an action of trover by partners a plea of bankruptcy of one of them is sufficient.*—In an action by partners for the conversion of partnership property, a plea which avers the bankruptcy of one of them is a good and sufficient plea in bar.—*Ib.* 597.

ADVANCES ON CROPS.

1. *To create a lien for advances the statute must be complied with.*—To constitute a valid crop lien for advances, not only the form but the spirit of the statute must be complied with in every essential particular.—*Greil & Bro. v. Lehman, Durr & Co.* 419.
2. *It is unnecessary to specify the land on which the crops will be produced.* The law directs that the instrument creating the lien shall be recorded in the county in which the makers of it reside; but it does not require that the land on which the crops are to be raised shall be specified.—*Ib.* 419.

AGENCY.

1. *The agents of the "swamp and overflowed lands" are entitled to equal compensation.*—The agents appointed by the Governor of the State in 1860 to "select and determine by proof the swamp and overflowed lands within the limits of this State," and the agents appointed by the same authority in 1869, to obtain a patent or patents from the Federal Government for the land so selected, are entitled to equal shares of the money, appropriated for the compensation of their services.—*Saffold v. Powell et al.* 379.

AMENDMENT.

1. *An amendment will not be presumed, because leave to amend was granted.* In the absence of anything of record to show that an amendment was made, it can not be presumed that it was made, from the mere fact that leave given to amend.—*Keith v. Cliatt & Bro.* 408.
2. *The statutes of an amendment are liberally construed.*—The statutes in regard to amendments of pleadings have been liberally construed by this court. Amendments which do not change the form of action, the entire cause of action, or the parties to the action, may be allowed at any stage of the proceeding, so as to secure a trial on the merits.—*Beavers v. Hardie & Co.* 570.
3. *An amendment supported by no evidence may be refused.*—But is not error to refuse an amendment to which a demurrer would be sustained; or an amendment offered after the evidence of the plaintiff had closed, and which was supported by no testimony.—*Ib.* 570.
4. *Amendable defects in a complaint, not brought to the attention of the Circuit Court, will not be considered.*—On an appeal, the defects of the complaint filed in the Circuit Court, and not brought to the attention of the court trying the case, will be disregarded by the Supreme Court, if they were such as could have been amended in the Circuit Court.—*South & N. Ala. R. R. Co. v. Seate,* 608.

APPLICATION OF PAYMENTS.

1. *A debtor may direct the application of a payment.*—A debtor before, or at the time, of payment, may direct the application: if he does not, the creditor may apply it as he pleases. If the money paid is derived from a particular source or fund, its payment must be applied to the relief of such fund, unless an agreement be made for its application otherwise.—*Levystein & Simon v. Whitman et al.* 345.
2. *If a payment be disputed, the party affirming it must prove it.*—If a payment be disputed, the burden of proving it lies on the party affirming it; and when the debtor asserts that he directed the appropriation of a partial payment, the burden of showing it rests on him.—*Ib.* 345.
3. *A creditor can not divert a payment without the consent of the debtor.*—It is the application of the payment by the debtor which deprives the creditor of this right, and also hinders the law from appropriating it; but if the creditor proposes to divert the payment from the relief of the fund or source whence the money is derived, he must obtain authority from the debtor for such division.—*Ib.* 345.

ARBITRATION.

1. *An award may be as conclusive as a judgment.*—If the submission of matters to be arbitrated was regular, and the award responds to every material question submitted, it is as conclusive between the parties as a judgment of a court, until assailed and set aside.—*Yeatman v. Mat-tison*, 382.
2. *A defendant can not defeat an action upon a note by showing that the plaintiff obtained it from the payee without consideration.*—If pending a suit an arbitration is made, and in pursuance of the award the defendant, at the request of the plaintiff, executes a promissory note to a third person, he can not, when sued on the note, defeat the action by showing no consideration passed between the plaintiff and payee; nor can he raise any question as to the application of the money due on the note to payment of attorney's fees of plaintiff's counsel in the original suit.—*Ib.* 382.

ATTACHMENT.

1. *Insolvency alone will not justify a resort to the remedy by attachment.*—Indebtedness alone will not justify a resort to the remedy by attachment, not even when coupled with pecuniary embarrassment, or actual insolvency.—*Durr et al. v. Jackson*, 203.
2. *Actual fraud, or an intent to hinder and delay creditors, must exist.*—It is actual fraud, an evil intent to hinder and delay creditors, not a mere refusal or failure to pay debts, which will support the accusation that a debtor is fraudulently withholding his property from the payment of his debts. To protect creditors against fraud is the object of the law which authorizes the issue of an attachment.—*Ib.* 203.
3. *In a suit for the "vexatious suing out" of an attachment, it is not necessary to prove personal ill-will.*—In an action for the vexatious suing out of an attachment, it is not necessary to prove personal ill-will, or revenge. A party may, without probable cause, resort to an attachment; and absence of probable cause, coupled with the unlawful act of suing out the writ, is the vexatious, malicious abuse of the process against which the statute intends to guard, and for which the jury are authorized to give vindictive damages.—*Ib.* 203.
4. *A plaintiff is not liable for the expenses of taking care of property levied on under an attachment, when it is released.*—A plaintiff in an attachment suit, who agrees to release the levy on the property attached, and to give an order to the sheriff for its restoration to the defendants, and if any have been sold, to deliver the proceeds also to the defendants, and performs this agreement, does not guaranty the good conduct of the sheriff; and is not liable for the expenses incurred in taking care of the property.—*McPherson et al. v. Harris*, 620.

ATTACHMENT—*Continued.*

5. *A person advancing money to make a crop, can force his lien by attachment.*—When provisions, stock or money have been advanced to make a crop, and the person obtaining them acknowledges the advances in a note or written obligation, declaring therein the purposes for which such advances were made, and the instrument is properly recorded within sixty days, it is a lien on the crop and on the stock furnished or bought with the money advanced; and the party advancing the money, or supplies, has a remedy co-extensive with that given the landlord and can enforce the lien by attachment.—*Grady et al. v. Hall*, 341.
6. *The levy of an attachment on land creates a paramount lien.*—The levy of an attachment on land creates a lien which is paramount to any subsequent charge, or alienation caused either by the operation of law, or the act of the defendant.—*Grigg, adm'x v. Banks*, 311.
7. *The land may be alienated, subject to the lien.*—The power of the debtor to charge or alienate the property, in subordination to the lien, is ample and complete. The lien necessary takes effect from the day of the levy.—*Ib.* 311.
8. *If a writ of attachment issue on an unconstitutional law, it will be abated on a proper plea.*—If a statute authorizing the issue of an attachment be violative of the constitution, on a proper plea the attachment will be abated.—*Murphy v. ex rel. Egger*, 639.
9. *If the goods be wrongfully withheld from the owner, an action at law will lie.*—If the possession of goods be wrongfully withheld from the owner, because of the refusal of the plaintiff in attachment to receive them from the bailee of the sheriff, in an appropriate action at law, the wrong may be redressed.—*Ib.* 639.
10. *An attachment levied on property conveyed by a bona fide assignment will be enjoined.*—If an insolvent foreign corporation conveys bona fide its lands to an assignee for the equal benefit of its creditors, a court of equity will enjoin the prosecution of an attachment commenced after the assignment, and levied on the property assigned.—*Thorington v. Gould*, 461.
11. *Substantial defects in an affidavit can not be amended.*—Defects of substance in an affidavit for attachment are not curable by amendment, and when properly presented by plea in an abatement are fatal.—*Shield v. Dothard et al.* 595.
12. *An affidavit in an attachment suit is defective if it does not state the removal was withheld without the landlord's consent.*—An affidavit in an attachment suit for rent is fatally defective if it does not allege that the removal of the crops from the rented premises was without the landlord's consent.—*Ib.* 595.

ATTORNEYS-AT-LAW.

1. *An attorney has a lien on a judgment in favor of the client for his fee.* An attorney-at-law or a solicitor in chancery has a lien upon a judgment or decree obtained for a client to the extent of the compensation agreed on; or if there be no agreement, to the extent to which, he is entitled to recover reasonable compensation of the client for the services rendered.—*Ex parte Lehman Durr & Co.* 631.
2. *The lien of an attorney is an assignment of the judgment to the extent of his fee.*—The lien of an attorney or solicitor rests on the theory that he is to be regarded as an assignee of the judgment or decree, to the extent of his fee, from the date of the rendition of the judgment, or decree, and is subject to all set-offs existing against it at the time.—*Ib.* 631.
3. *A champertous contract is against public policy.*—A contract in which it is agreed that attorneys-at-law shall receive one half of the land in litigation, for the services they may render in the suit, if it should be

ATTORNEYS-AT-LAW—*Continued.*

- conducted to a successful termination, is champertous; and being against public policy is void.—*Jenkins v. Bradford*, 400.
4. *Transactions between attorney and client are closely scrutinized.* Transactions between attorney and client, as between other persons occupying fiduciary relations, are anxiously and jealously scrutinized by the courts, so that the client may be protected from the influence or ascendancy which the relation generates.—*Dickinson v. Bradford*, 581.
 5. *Before the fiduciary relationship begins, any lawful contract may be made.*—An attorney may, before entering on the business of his client, lawfully contract for the measure of his compensation; and any contract then made is as valid and as unobjectionable as if made between other persons competent to contract with each other. But after the fiduciary relation has commenced, no subsequent agreement with his client for compensation can be supported, unless it is a fair and just remuneration for his services.—*Ib.* 581.

BAIL.

1. *Allowance of bail was not a right at common law.*—Admission to bail at common law was not a matter of right, but rested in a sound judicial discretion, and its allowance was the exercise of judicial power. In this State it has been controlled by constitutional and statutory provisions.—*Hammors et al. v. The State*, 164.
2. *In cases of misdemeanor, bail is matter of right.*—On an indictment for a misdemeanor, bail is a matter of right, and on the sheriff in whose custody the defendant may be, is devolved the duty unconditionally of discharging him on sufficient bail. On an indictment for a felony, if the defendant does not give bail in open court, it must make an order and cause the same to be entered of record, fixing the amount of bail required. This the sheriff may take in vacation and discharge the defendant.—*Ib.* 164.
3. *Bail taken on Sunday is valid.*—An undertaking of bail, entered into on Sunday, during vacation, is sanctioned by the law, and is perfectly valid.—*Ib.* 164.
4. *The liability of bail is not under absolute control of the court.*—The statute does not clothe the court with an absolute power of discharging or fixing the liability of bail; nor does it confer the power to determine questions of fact without the intervention of a jury, on which the validity of the undertaking or the liability may depend.—*Ib.* 164.
5. *The court can determine the sufficiency of the excuse for a default.* The power of the court is to determine the sufficiency of the excuse for the default of the principal at a former term. If the excuse be adjudged sufficient, the conditional judgment must be set aside without costs. This power is intended to be exercised only when the principal appears, submits to the orders of the court, and can be held to answer the indictment.—*Ib.* 164.
6. *Parties may sign an undertaking of bail with their initials or mark.* Parties to such an undertaking may employ initials, a mark or any other designation, and will be bound as if they had written their names in full, if such was their intention.—*Ib.* 164.
7. *"Approved" need not be endorsed on undertaking of bail.*—An undertaking of bail conforming substantially to the requirements of the statute, is not void because the officer taking it does not endorse thereon "approved," and sign such endorsement. Such an endorsement is not the only evidence of the acceptance of the undertaking. It may be proven by other competent evidence.—*Ozely et al. v. The State*, 94.
8. *The acceptance of the bail shows its approval.*—Evidence that the undertaking was signed in the presence of the magistrate; that he took possession of it and discharged the principal from custody, and the under-

BAIL—*Continued.*

taking is subsequently found on file in the court to which it binds the principal to appear, is as satisfactory evidence of the approval and acceptance of the undertaking as its endorsement in the most formal manner.—*Ib.* 94.

BANKRUPTCY.

1. *Bankruptcy will cause a dissolution of the partnership.*—A partnership will be dissolved by the bankruptcy of one of its members; and the assignee of the bankrupt becomes a joint owner with the solvent partners, of the property of the partnership.—*McNutt et al. v. King et al.* 597.
2. *The transfer of a right of action by the assignee, does not authorize the transferee to sue in his own name.*—The transfer by such an assignee of a mere right of action for the conversion of personal property does not invest the transferee with a legal title; the only effect of the transfer would be to authorize the transferee to sue in the name of the assignee, jointly with the solvent partners, and to receive the bankrupt's share of the amount recovered.—*Ib.* 597.
3. *Only the assignee of a voluntary bankrupt can file a bill to set aside a fraudulent conveyance.*—Where there is no lien on the property of a person who becomes a voluntary bankrupt, his assignee only has authority to institute suit for the purpose of annulling and setting aside conveyances made the bankrupt with the intent to delay, hinder and defraud his creditors.—*Bolling v. Munchus*, 482.
4. *The assignee is the representative both of the bankrupt and his creditors.* As the representative of the bankrupt the assignee succeeds to all the title and rights of property (except the exemptions), which the bankrupt owned. And as the representative of the creditors of the bankrupt he has all the rights of the creditors to pursue and subject to the payment of the bankrupt's debts, property which he had secreted, or disposed of in fraud of his creditors.—*Ib.* 482.
5. *After the discharge of a bankrupt, a creditor without a lien can not set aside a voluntary conveyance made by him.*—After the discharge of a bankrupt his creditor who had no lien upon his property can not file a bill for the purpose of setting aside a voluntary conveyance made by him before his bankruptcy.—*Ib.* 482.

BOND.

1. *A bond sued on can be impeached only by a special plea.*—When the complaint avers that the defendants executed a bond under seal, which is the foundation of the suit, they can not impeach its validity, or inquire into its consideration, except by special plea; or raise that question by objecting to the introduction of the bond as evidence. *Johnson et al. v. Caffey*, 331.
2. *A sheriff may make more than one official bond.*—Although a sheriff has been already inducted into office, and is acting under an official bond, duly accepted and approved, there is nothing to prevent him from voluntarily executing another official bond; if it be in form and is accepted and duly approved, he and his sureties will be liable upon it for any neglect, or other improper conduct.—*Ib.* 331.
3. *A covenant not to sue releases the debtor.*—A covenant by a creditor not to sue his debtor operates as a release.—*Flinn v. Carter*, 364.
4. *An error in the description of the decree does not invalidate the bond of indemnity.*—A bond of indemnity which recited that a decree had been rendered against a guardian and his sureties, when it had been rendered only against the guardian, is not void on this account. The error is immaterial.—*Ib.* 364.
5. *The consideration of a written instrument may be inquired into.*—The consideration of a bond, bill, note or other written evidence of debt,

BOND—*Continued.*

whether it is silent as to, or expresses, the particular consideration, is, in respect to the consideration, open to inquiry, and parol evidence may be received to explain, or to qualify, or to contradict any recital of consideration it may contain.—*Blum & Co. v. Mitchell*, 535.

6. *An officer, who neglects a plain duty, becomes a trespasser ab initio.* If a statute imposes a plain duty on a sheriff to deliver property to the party from whom it was taken, on failure of the plaintiff in a detinue suit to give the bond within the prescribed time, he has no discretion; and if he does not return the property, or delivers it to another person, he is guilty of trespass *ab initio*, and is liable on his official bond. *Gay v. Burgess et al.* 575.

CHANCERY.

I. JURISDICTION AND GENERAL PRINCIPLES.

1. *When a corporation can not be made answerable at law, a court of equity will seize its property for the benefit of its creditors.*—If without the payment of its debts, the property of a corporation is distributed among its stockholders, or transferred for their benefit to third persons, who are not *bona fide* purchasers without notice; or if the corporation should be dissolved, or become so disorganized that it can not be made answerable at law, then a court of equity will lay hold of its property and effects, and apply them to the payment of its creditors.—*Monty. & W. Point R. R. Co. v. Branch, Sons & Co.* 139.
2. *A suit at law in a Federal court can be enjoined only by the same court.* A defendant, sued at law in a Federal court, who has an equitable defence, or is entitled to the benefit of an injunction, should file his bill on the equity side of the same court. No tribunal of a State can enjoin such a suit.—*City of Opelika v. Daniel et al.* 211.
3. *Courts do not judicially know the members of a firm.*—What individuals transact business under a firm name, courts can not judicially know. It is only the persons that compose a partnership of whom they can take cognizance, upon whom their process can be served, and against whom their orders and personal decrees can be enforced. The court has no jurisdiction of unknown persons engaged in business together, under a name which is not the name of an individual or of a body corporate, and can not render a decree against them.—*Ib.* 139.
4. *On the death of a tenant a court of equity will enforce the lien of the landlord.*—When the death of a tenant renders it impossible to pursue the statutory remedy by attachment, a court of equity will enforce the lien of the landlord.—*Abraham et al. v. Hall et al.* 386.
5. *Irregularities in judicial proceedings will not authorize the interference of courts of equity.*—Irregularities in judicial proceedings, or the errors of courts of competent jurisdiction, can not create an equity which will justify the interference of a court of equity.—*Bowden v. Perdue*, 409.
6. *The wrong must occur without fault of the complainant.*—The court may be satisfied that injustice has been done, but the unvarying condition precedent to its interference, is the clear demonstration that the wrong occurred without fault or negligence of the complainant. *Ib.* 409.
7. *The want of diligence destroys the claim to equitable relief.*—The want of diligence, on the part of the complainant, is as fatal to any claim for equitable relief under the statute as under the rule, defining the original jurisdiction of a court of equity.—*Ib.* 409.
8. *A court of equity will not enjoin an action of ejectment brought to recover land not conveyed by deed.*—A court of equity will not enjoin an action of ejectment brought for the recovery of land, sold for Confederate treasury notes, when no deed of conveyance had been executed, and the promissory note given for the purchase-money, had

CHANCERY—JURISDICTION AND GENERAL PRINCIPLES—*Continued.*

- matured after the surrender of the Confederate armies in 1865. *Daudrill v. Edwards et al.* 424.
9. *A court of equity can not impose on it burdens not imposed by the statute.* The liability of the statutory estate of a married woman is fixed by law, and a court of equity is as powerless as a court of law to dispense with the requirements of the statute, or to subject it to burdens beyond what the statute imposes.—*O'Connor v. Chamberlain*, 431.
 10. *A judgment in a case of unlawful detainer against the lessee, will not prevent a resort to equity.*—A judgment against the lessee, in the statutory action of unlawful detainer, will not preclude a resort to equity; the right to possession is alone involved, and no recoupment or set-off is allowable, for the lessor's breach of his covenants. *Abrams v. Watson et al.* 524.
 11. *One person can not enforce his rights so capriciously as to defeat the rights of others.*—If one party has a lien or interest in two estates, and another in only one of the estates, a court of equity will not permit the former to elect against which he will proceed, so as to defeat the claims of the latter; but the party having such interest in both estates can not be compelled to resort only to one of them, unless it is shown to be sufficient to satisfy his interest or debt; and a bill filed for such purpose, without a clear averment to that effect, is defective. *Coker v. Shropshire et al.* 542.
 12. *A mortgagor can not enjoin the sale of land embraced in the mortgage.* A mortgagor can not maintain a bill to restrain the sale under a mortgage, of land not conveyed by it. The purchaser at the sale could only take the land mortgaged. Such a sale can not cast a cloud on the title of land not included in the mortgage.—*Preiss v. Campbell*, 635.
 13. *In an application for the specific performance of a contract, it should be distinctly averred.*—To sustain a decree of specific performance, the contract sought to be enforced must be clearly and distinctly averred; its terms must be definite and unequivocal, and the proof in support of it clear and unambiguous.—*Cox v. Cox et al.* 591.
 14. *A specific performance will not be decreed unless the consideration of the contract clearly appears.*—Specific performance will not be decreed on averment that land was purchased by complainant and father-in-law for the benefit of complainant and wife, when it does not appear what was the consideration of the promise, or that the purchase was joint as alleged.—*Ib.* 591.
 15. *A court of equity, in the absence of peculiar facts, will not arrest proceedings in a court of probate.*—A court of equity will not, at the instance of an administrator or executor, arrest proceedings commenced in a court of probate, for a final settlement of an administration, unless some specific fact or circumstance is shown, which renders the limited power of that court inadequate to a full and complete settlement of the trusts of the administration.—*Whorton v. Morague, et al.* 641.
 16. *A court of equity will dispense with an administration, when its only object is to make distribution.*—Courts of equity will dispense with an administration, if granted, would be to make such distribution.—*Jones, Adm'r v. Brevard, et al.* 499.
 17. *After the lapse of twenty years, it will be presumed no debts existed against an intestate.*—After the lapse of twenty years, it will be presumed, in the absence of proof to the contrary, that no debts existed against an intestate upon whose estate no administration had been granted.—*Ib.* 499.
 18. *Courts of equity and law place the same construction on statutes of set-off.* Courts of equity place the same construction upon the statutes of set-off that the courts of law adopt; and in the absence of special equities, the individual debt of an administrator is not available as a set-off to a demand due him in his representative capacity.—*Ib.* 499.

CHANCERY—Continued.

II. PLEADINGS AND PRACTICE.

19. *Section 2905 of the Code applies only to suits at law.*—Section 2004 of the Code of 1876 does not relate to proceedings in a court of equity. *City of Opelika v. Daniel et al.* 241.
20. *Books of partnership are evidence for and against the partners.*—In a suit for the settlement of partnership accounts, the register, on a reference, should receive such books as evidence for and against all the partners.—*Routen et al. v. Boswick et al.* 360.
21. *Books produced at the instance of complainant, are evidence against him.*—When a bill requires a defendant to produce books and papers in his possession, for the purposes of an account, on production, they become evidence against the complainant.—*Id.* 360.
22. *When an injunction will be dissolved.*—The general rule of practice is that on the filing of an answer, an injunction may be dissolved on motion, if the equity of the bill is fully and completely denied; and whether the allegations of the bill be denied or not, an injunction may be dissolved, if the bill be wanting in equity.—*Bishop et al. v. Wood,* 253.
23. *The right of amendment must be claimed.*—The right of amendment is secured by the statutes; but it is a right which must be claimed by the party entitled to it; and when there is an opportunity of claiming it, the chancellor errs only by a denial of it.—*Id.* 253.
24. *It is error to dismiss a bill in vacation, when a complainant has not had an opportunity to amend the bill.*—When the demurrer to the bill, or a motion to dismiss it for want of equity, has not been heard; and the equity of the bill is drawn in question only incidentally, and the decree is rendered in vacation,—an absolute dismissal of the bill without affording the complainant an opportunity of amendment, is erroneous.—*Id.* 253.
25. *A bill must be amended before the final decree.*—The right to amend bills of complaint and answers conferred by section 3790 of the Code of 1876, must be exercised before the final decree.—*Smith v. Coleman et al.* 260.
26. *A decree settling the equities is final.*—A decree settling all the equities between the parties is final, and from it an appeal may be taken to the Supreme Court.—*Id.* 260.
27. *The amendment can be made only in reference to evidence already taken.* The right to amend the pleadings so as “to meet any state of the evidence which will authorize relief,” is confined to the evidence already taken.—*Id.* 260.
28. *A final decree cannot be amended at a subsequent term.*—When a final decree is free from errors, but the case is reversed and remanded, because without the consent of parties the chancellor confirmed the report of the register in vacation, the court, at a subsequent term, has no authority to amend the decree on the merits, or to allow an amendment which seeks to accomplish such a result.—*Id.* 260.
29. *A bill is not demurrable because it fails to allege the vendor had a good title.*—A bill to enforce a vendor’s lien, which avers that the defendant entered into and retains possession of the land under the contract of purchase, and that he accepted the vendor’s bond conditioned to make title upon payment of the purchase-money, and that it is due and unpaid, is not demurrable because it does not allege that the vendor had a good title.—*Teague v. Wade,* 369.
30. *A bill must show a case within the jurisdiction of a court of equity.*—A bill must necessarily disclose a case falling within the jurisdiction of a court of equity, and an error in this respect is fatal at any stage of the proceedings.—*Id.* 369.
31. *A bill need not show the amount in controversy is within the jurisdiction of the court.*—A bill is not demurrable because it fails to show

CHANCERY—PLEADINGS AND PRACTICE—*Continued.*

- affirmatively that the amount in controversy is within the jurisdiction ; if it is not, the objection must be raised by plea to answer on the hearing.—*Abraham et al. v. Hall et al.* 386.
32. *A naked bailee is not a necessary party to a bill against the bailor.*—A mere naked bailee who asserts no claim in himself to property deposited with him as warehouseman, should not be made defendant to a bill against the bailor, praying for an equitable attachment.—*Ib.* 386.
 33. *The personal representative must be a party to a bill filed to charge personal assets.*—A bill to charge personal assets can not be maintained unless the personal representative of the decedent, in whom the legal title resides, is before the court.—*Ib.* 386.
 34. *The grant of a temporary injunction without requiring a bond, is irregular.*—The grant of a temporary injunction on a bill not verified, and without requiring bond from the complainant, is an irregularity ; but it will not cause the reversal of the final decree, if that is supported by the pleadings and proofs.—*Thorington v. Gould*, 461.
 35. *An answer should distinctly show what is alleged on knowledge and what on information.*—A denial of allegations on information and belief, by a defendant in a suit in equity, will not overturn positive averments ; and if the answer of the defendant does not distinctly show what is alleged on his knowledge, and what on his information and belief, the decree of the chancellor will be affirmed.—*Stallworth, Adm'r v. Lassiter*, 558.
 36. *When a bill is dismissed prematurely, nothing but its equity will be considered.*—When a bill is dismissed for want of equity before the cause was in condition to be heard on its merits, the appellate court will decide no other question than the equity of the bill, because no other was submitted to, and passed upon, by the chancellor.—*Whorton, Ex'r v. Moragne et al.* 641.

CHANGE BILLS. See CRIMINAL LAW.

CHANGE OF VENUE.

1. *On a change of venue, the court must select the county.*—It concerns the public as well as individuals that all trials for offences shall be fair and impartial. On an application for a change of venue, the court must decide what is the nearest county free from objection.—*Ex parte Hodges*, 305.

CHARGE TO JURY.

1. *It is error to give a charge not sustained by the evidence.*—Charges given by the court, at the request of the plaintiff, and founded on recitals of facts of which no evidence whatever was submitted to the jury, are erroneous, and will cause a reversal of the judgment.—*The Bank of Kentucky v. Jones*, 123.
2. *A charge correct in law, but which tends to mislead the jury, will not cause a reversal.*—A reversal can not be had because of an instruction correct in point of law, merely on account of its tendency to mislead. The evil is capable of correction by an explanatory charge, which should be requested.—*Durr et al. v. Jackson*, 203.
3. *A charge which leaves a fact, growing out of a contract to be ascertained by the jury, is not erroneous.*—When from the terms of a contract for the delivery of timber, the court can construe a "stipulation to give a lien and mortgage on timber" as fast as gotten out "to embrace" timber in existence when the contract was made, as well as timber to be manufactured afterwards, a charge which leaves this fact to be ascertained by the jury from the evidence, is not erroneous.—*Morningstar v. Wiggins & McMillan*, 267.
4. *It must affirmatively appear that charges refused were in writing.*—Unless it affirmatively appears that the charges refused were in writing,

CHARGE TO JURY—*Continued.*

- the refusal of them can not be reversed on error.—*South and North Ala. R. R. Co. v. Seale*, 608.
5. *A charge that declarations and conduct were evidence is calculated to mislead*—An instruction to the jury, at the request of the defendants, that their declarations and conduct were evidence of marriage, without explanation or qualification, would confuse and mislead, and was properly refused.—*Green et al. v. The State*, 68.
 6. *A charge stating circumstances tending to show guilt, should also state those which may explain them.*—Where the testimony tended to show the indisposition of the prisoner, a charge by the court that, if defendant was within four hundred yards of where the gin-house was burned, and was advised of the burning and did not go and aid others in saving property that might be saved from the fire, the jury might look to that fact as a circumstance, with other evidence tending to show his guilt, is objectionable, because it did not refer to his alleged indisposition.—*McAdory v. The State*, 92.
 7. *An abstract charge should be refused.*—A charge based upon no evidence in the case is abstract, and is properly refused.—*Beasley v. State*, 92.
 8. *The cases of Murphy v. State and Mose v. State approved.*—Such a charge uses almost the identical language employed by the court in *Murphy v. The State* (6 Ala. 845); and the same principle is declared, in different language, in *Mose v. The State* (36 Ala. 845.) These two statements, of the one and the same principle, have long stood as guides, and can not be questioned.—*Coleman v. State*, 52.
 9. *The law requires moral, not mathematical certainty.*—When a charge embodying the principle of these two decisions is requested, the court should give it; and then in a distinct charge should instruct the jury that it is moral, not mathematical certainty of proof, which the law requires.—*Ib.* 52.
 10. *A reasonable doubt is properly defined.*—The court approves the definition of a "reasonable doubt" which will justify an acquittal, given in *Mose v. The State*, and must not be understood as qualifying the doctrine there declared.—*Ib.* 52.

COMMISSIONERS' COURT.

1. *The Court of County Commissioners has quasi legislative powers.*—The Court of County Commissioners in reference to the establishment and change of public road exercises a quasi legislative authority, which other tribunals will not revise or control, unless its action injures or interferes with rights of property.—*Commissioners' Court of Lowndes Co. v. Hcarne*, 371.
2. *Its record must show jurisdiction.*—The court is of limited statutory authority, and to support its proceedings when assailed on *certiorari*, its records must affirmatively show jurisdiction.—*Ib.* 371.
3. *After its action a writ of certiorari is complete.*—After the court orders the change of a road, appoints viewers and accepts their report, the right of a person aggrieved, to a *certiorari* is complete; and the court in its return should certify its records as they existed when the writ was issued, and not a record subsequently made whose validity has not been questioned.—*Ib.* 371.
4. *The Court of County Commissioners can amend its records.*—The Commissioners' Court, like every court of record, has power to amend its records *nunc pro tunc*, if there be matter of record, that authorizes the amendment.—*Ib.* 371.

COMMON CARRIERS.

1. *The greatest diligence is required of persons having charge of locomotive engines.*—Persons having control of steamboats and locomotive engines must employ more than ordinary skill and diligence to prevent

COMMON CARRIERS—*Continued.*

- disasters. They are required to be skilled in their particular departments; but infallibility is not required of them.—*Mobile & Montg. Railw. Co. v. Blakely*, 471.
2. *The train need not be stopped always because persons are on the track.* The presence of persons on the railroad track does not require them to stop their trains or even check them, unless the circumstances show their approach is not observed, or the person is unable to leave the track.—*Ib.* 471.
 3. *Persons can not convert railroad tracks into common thoroughfares.* Railroad tracks are not highways for general travel, and persons can not as matter of right convert them into common thoroughfares except at public crossings, and then only for the purpose of crossing with no undue tardiness.—*Ib.* 471.
 4. *An officer who fails to perform a legal duty is indictable.*—An officer having control of a train of cars, who fails to perform a duty enjoined by statute may be indicted; and any person who suffers an injury which would not have resulted had the statutory duty been performed, has a right of action.—*Ib.* 471.
 5. *The provisions of section 1700 of the Code does not apply to human beings.*—Section 1700 of the Code contains a special provision as to cattle or stock, but has no reference to human beings. The measure of duty and liability for injury to stock found on the track is so different from what pertains to the safety of intelligent human beings, that a charge by the court applicable to one on a trial for the other, would confuse and mislead the jury.—*Ib.* 471.
 6. *A conductor of a train may be examined as an expert.*—A person who has acted continuously for more than seven years as a "railroad conductor," can be examined as an expert, relative to the means of stopping railroad trains.—*Ib.* 471.
 7. *The imperfect equipment of a train will not excuse negligence in an employee.*—The imperfect equipment of a train does not relieve the conductor from the exercise of due diligence in its management. *Mob. and Mont. Railw. Co. v. Clinton*, 392.

CONSTITUTIONAL LAW.

1. *The act authorizing cities to subscribe to the stock of railroad companies is constitutional.*—The "act to authorize the several counties, towns and cities of this State to subscribe to the capital stock of such railroads as they may consider most conducive to their respective interests," is a valid law.—*City of Opelika v. Daniel*, 211.
2. *Section 383 of the Code of 1876 is unconstitutional.*—Section 383 of the Code of 1876, establishes a rule for the estimation of the value of railroad property for the purpose of taxation which is not authorized by the constitution; and, therefore, the assessment of taxes made in obedience to it is invalid, and was properly vacated by the City Court of Montgomery.—*Board of Assessment v. Ala. Cent. R. R. Co.* 551.
3. *The Penal Code was constitutionally enacted.*—Section 4189 of the Code was taken from the Revised Code of 1867; thither it was carried from the Penal Code of 1866; and the enactment of the statute "to establish a new Penal Code" was a constitutional enactment of all the provisions contained therein.—*Hoover v. The State*, 57.

CONSTRUCTION OF STATUTES.

1. *When the legislature employs different language in a subsequent statute in the same connection, the courts will presume a change of the law is intended.*—The legislature must be presumed to know both the language employed in the former acts, and the judicial construction placed upon them; and if in a subsequent statute on the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended, and after a consideration of the spirit

CONSTRUCTION OF STATUTES—*Continued.*

- and letter of the statute, will give effect to its terms according to their proper signification.—*Lehman, Durr & Co. v. Robinson*, 219.
2. *In the interpretation of an act, all of it must be considered.*—In construing a statute, regard must be had to the whole act; and if need be, to other statutes passed on the same subject; for the meaning of a clause is sometimes shown by another that is not stated in connection with it.—*Ib.* 219.
 3. *The act of February 5th, 1872, explained.*—The act to prevent homicides, approved February 5th, 1872, was intended not merely to give compensation for the lost earnings of the slain by the wrongful act or omission of another, but is also punitive in its purpose; and its provisions apply as well to corporations as to natural persons.—*South & North Ala. R. R. Co. v. Sullivan*, 272.
 4. *The damages recovered under that act become assets of the estate.*—The compensation given by the act does not go to the husband, wife or child of the deceased, as such, but becomes assets of the estate, not subject to the payment of debts, and must be distributed as the personality of an intestate is now distributed.—*Ib.* 272.
 5. *The provisions of section 1700 of the Code do not apply to human beings.* Section 1700 of the Code contains a special provision as to cattle, but has no reference to human beings.—*Mobile & Montg. Railw. Co. v. Blakely*, 471.
 6. *Section 3120 applies only to actions for money.*—Section 3120 of the Code applies only to actions for money, and not only to actions for the conversion or detention of personal property.—*Hawes v. Morgan*, 508.
 7. *Sections 2222 and 2223 of the Code are highly penal.*—Sections 2222, and 2223 of the Code of 1876, are highly penal, and must be strictly construed. They do not authorize the institution of a suit against the transferee of the mortgage.—*Grooms v. Hannon*, 510.

CONTRACTS.

1. *A contract should be so construed as to effect the object of the parties.* In the construction of a contract, written or oral, the great object is to ascertain, and if possible, to effectuate the intention of the parties.—*McPherson et al. v. Harris*, 620.
2. *A contract must be construed according to its terms.*—When a contract is expressed in clear and unambiguous terms, it is not legitimate to imply a further and larger obligation.—*Ib.* 620.
3. *A champertous contract is void.*—A contract in which it is agreed that attorneys-at-law shall receive one half of the land in litigation, for the services they may render in the suit if it should be conducted to a successful termination, is champertous; being against public policy, is void.—*Jenkins et al. v. Bradford*, 400.

CONVEYANCE.

1. *A deed must be attested by at least one subscribing witness or acknowledged.*—An instrument intended to convey lands is inoperative to transfer the legal title, unless, if the grantor can write, it is attested by at least one subscribing witness, or execution of it is acknowledged by the grantor in the manner prescribed by law.—*Bank of Kentucky v. Jones*, 123.
2. *Unless the plaintiff shows such a deed, or that it once existed, he can not recover.*—On a trial of an action of ejectment a plaintiff who does not exhibit such a title to the land in controversy, or prove that such a deed once existed, is not entitled to recover.—*Ib.* 126.
3. *The recital of a deed is not evidence against a creditor of the grantor.* In a controversy between the grantee and a creditor of the grantor, relative to the validity of the conveyance, its recital of the consideration is merely an admission of the grantor, and is not evidenced against the creditor.—*Habbarth et al. v. Allen*, 283.

CONVEYANCE—*Continued.*

4. *In such a contest the onus of proving the value and adequacy of the consideration is upon the grantee.*—In such a contest the onus of proving that the conveyance was founded on an adequate and valuable consideration, is cast upon the grantee; and without regard to the motives of the parties in its execution, as to the rights of existing creditors, the deed will be presumed to be fraudulent until the contrary is shown.—*Ib.* 283.
5. *Evidence of a consideration different in kind from that expressed is inadmissible.*—Although the nature of the consideration may not be changed, any consideration of the same kind, and not inconsistent with that recited, may be proven; and if it be adequate, will support the conveyance.—*Ib.* 283.
6. *A parol gift of land is void.*—A parol gift of land made by a parent to his child is void, and confers no right that can be enforced either at law or in equity. If, subsequently, a deed be executed in consummation of the gift, it is voluntary; it takes effect from the time of its execution, and can not prejudice the rights of existing creditor.—*Ib.* 283.
7. *A voluntary conveyance of a debtor is void against existing creditors.* In this State, a voluntary conveyance by a debtor, having property more than sufficient to pay all debts or demands against him, is by presumption of law void as to existing creditors, although no fraudulent intent can be computed either to the donor or the donee.—*Bibb, Adm'r v. Freeman*, 612.
8. *A person having a contingent claim is a creditor within the meaning of the statute of frauds.*—A creditor, within the statute of frauds (Code of 1876, § 2124), as to whom a voluntary conveyance is void, is not necessarily one, who has a demand for money which is due, or running to maturity, or who has an existing cause of action. Whoever has a claim or demand on a contract in existence at the time a voluntary conveyance is made, is a creditor within the meaning of the statute. A contingent liability is as fully protected as a claim that is certain and absolute.—*Ib.* 612.
9. *A conveyance beneficial to the donor or injurious to the donee is not voluntary.*—A voluntary conveyance is founded exclusively on motives of generosity and affection. If the donor receives a benefit, or the donee suffer detriment as the consideration of the conveyance, the consideration is valuable. However trivial the benefit to the one, or the damage to the other, may be, the conveyance is not voluntary.—*Ib.* 612.
10. *A deed of trust to indemnify sureties on a bond is not invalid as to existing creditors.*—A deed of trust on lands and personal property executed by a guardian of minors to save harmless sureties on his bond, and reserving to the grantor the right of possession of the property until the children arrive at their majority, is not invalid on its face as to existing creditors.—*Coker v. Shropshire et al.*, c. 542.
11. *Tenant for life can only convey his interest.*—A deed which in form conveys the fee, if made by a life tenant, transfers all the interest of the grantor, but it does not impair or affect the remainder, even though the latter be in form contingent.—*Smith et al. v. Cooper et al.* 494.
12. *An instrument reserving the power of revocation is a deed.*—An instrument which conveyed all the property owned by the grantor to a trustee for the benefit of her grand-children after his death, but retained for her the possession and use of it during her life, and reserved to her the power of revocation of the grant, must be considered as a deed, and not as a will.—*Hall v. Burkham, Hall et al.* 349.

CORPORATIONS.

1. *The legislature can not deprive the creditors of a corporation of their rights.*—The creditors of a corporation who are secured by mortgages of its property, acquire therein rights of which they can not be deprived even by an act of the legislature.—*Montg. & West Point R. R. Co. v. Branch, Sons & Co.* 139.
2. *When the charter of a corporation provides that a surrender of its franchises shall not affect the rights of creditors, the clause will be presumed to be for the benefit of unsecured creditors.*—When the charter of a corporation authorizes it to buy the property of another, and provides that such purchase or surrender of the franchises shall in no way affect the rights of the creditors of the company which sells, it will be presumed that such a clause was introduced for the benefit of the unsecured creditors.—*Ib.* 139.
3. *A private corporation is a trustee for the benefit of its creditors.*—A private corporation is a trustee of its property for the payment of its creditors, and afterwards for the benefit of its stockholders. During its existence and operation, its general creditors have no lien which will entitle them to sue it, in a court of equity; but its property can be subjected to the payment of its debts by actions at law.—*Ib.* 139.
4. *A corporation is liable for damages caused by the employment of unfit persons.*—If a railroad corporation authorizes a person to employ persons to maintain and repair the road, and to carry on its business, and he employs, or retains persons unfit for the service in which they are engaged, and injury results to another employee of the corporation from this cause, it is liable. The officer in such matters is substituted for the corporation, and his negligence is the negligence of the corporation.—*Mobile & Montg. Railw. Co. v. Smith*, 245.
5. *A corporation is liable for damages arising from the improper selection of an officer.*—When the duties entrusted to an officer are such as can not properly be performed by the corporation itself, then his negligence is not that of the corporation, unless it has failed to exercise due care in the selection of a proper officer.—*Ib.* 245.
6. *The nature of the duties required, determines the character of the employee.*—It is not the relative grades of different officers or employees, or the subordination of one to the other, which determines when they are fellow-servants in relation to their common employer; but it is the nature of the duty entrusted to them.—*Ib.* 245.
7. *In a suit against a corporation by an employee, it may recoup damages caused by his fault.*—A railroad corporation may recoup damages resulting from the negligence of an employee in the performance of his contract of service, when sued by the employee to recover his wages.—*Mob. & Mont. Railw. Co. v. Clanton*, 392.
8. *A corporation may sue an employee for damages caused by his negligence.*—When damage results to cars and other property of a corporation from the negligence of an employee in the performance of his duties, it may recover damages in an action against him.—*Ib.* 392.
9. *A corporation may make a bond in a judicial proceeding.*—The right to execute a bond in a judicial proceeding, is one of the incidental powers of all corporations that can sue and be sued. And the recitals of the bond in this case show it is the contract of the corporation.—*Collins et al. v. Hammock*, 448.
10. *An officer of a corporation, whose term of office has expired, may, if no successor be appointed, continue to perform the duties of the office.* When the duration of an official term is expressed by the charter of a corporation which creates the office, the intention is, that on the expiration of the term, the authority and duty of the officer shall cease; but if the proper corporate authorities neglect to provide a successor, and suffer the officer to continue the discharge of the duties of the office, unless the State or a stockholder objects, no one can complain, *Thorington v. Gould*, 461.

CORPORATIONS—*Continued.*

11. *The acts of a board of directors whose term has ended, are valid as to third parties.*—The acts of a board of directors, appointed under the charter to serve until the end of the first Monday in January thereafter, are, after the expiration of the time, valid as to third persons. *Ib.* 461.
12. *When the seal of a corporation is affixed to a deed by the proper officers, the validity of the contract will be presumed.*—When the common seal of a corporation is affixed to a deed, and it is signed by the officers authorized by the charter to sign, or attest its contracts, it will be presumed that the instrument was executed by the authority of the corporation; and those who assail it must show its invalidity.—*Ib.* 461.

COSTS.

1. *The State, by the common law, pays no costs.*—"The king shall neither pay nor receive costs," was the rule at common law. The same principle has been applied to the governments, State and Federal, in this country in civil and criminal causes.—*Pollard v. Brewer*, 130.

CRIMINAL LAW.

ABATEMENT.

1. *A name not idem sonans will sustain a plea in abatement.*—The name of Zachary is not *idem sonans* with that of Zachariah, and the difference is so material, that it will sustain a plea in abatement by a person of the former name indicted under the latter.—*Lawrence v. The State*, 61.
2. *A plea in abatement can be filed when defendant appears first.*—A plea in abatement in a criminal case is interposed in time, if it should be filed at the first term at which the defendant appears.—*Ib.* 61.
3. *Oyer of an indictment need not be craved.*—It is not necessary to crave oyer of an indictment before pleading in abatement to it. It must necessarily be read to the defendant, or a copy served on him without his praying oyer of it.—*Ib.* 61.

ARREST OF JUDGMENT.

4. *An arrest of judgment is made only on matters of record.*—A motion in arrest of judgment must be founded on matters appearing of record. Errors which the court may commit in the progress of the trial, which are not necessarily shown by the record, may be the matter of an exception or ground of a motion for a new trial, but not of a motion in arrest of judgment.—*Sparks v. The State*, 82.

ARSON.

5. *Indictment for arson in the third degree.*—The count of an indictment which charges that the defendant "wilfully set fire to or burned a cotton-house of R. H., within the curtilage of the dwelling-house of the said R. H., by the burning whereof the said dwelling-house was burned," charges the crime of arson, not in the second, but in the third degree, as defined by section 4348 of the Code of 1876.—*Cheatham v. The State*, 40.

ASSAULT WITH INTENT TO MURDER.

6. *The intent must be proven as a fact.*—On the trial of an indictment for an assault with intent to murder, the intent can not be implied as a matter of law, and the jury must determine its existence from all the evidence in the case; and the court invades their province, if a part only of the facts is singled out, and they are instructed to infer the felonious intent from them.—*Simpson v. The State*, 1.
7. *Self-defence, except in extreme cases, can not endanger life.*—Every

CRIMINAT LAW—ASSAULT WITH INTENT TO MURDER—*Continued.*

one has the right to defend his person and property against unlawful violence, and may employ as much force as is necessary to prevent injury. But this principle is subject to the qualification that he shall not, except in extreme cases, endanger life or inflict great bodily harm. *Ib.* 1.

8. *The protection due to the property is not enlarged by the secrecy of the trespass.*—The law declares with certainty the protection due to property, and defines the force which may be employed in the defence. And neither the secrecy of the trespass, nor the frequency of its repetition, enlarges the one or the other.—*Ib.* 1.
9. *A specific felonious assault must be proven.*—To authorize a conviction of an assault with intent to murder, a specific felonious intent must be proven. This is an indispensable element of the offence. The doctrine of an intent implied by law different from the intent in fact, can have no application to the crimes punished by section 3670 of the Code. If there was not the intent to murder the person assaulted, although there may have been a general felonious intent, a conviction of the aggravated offence would be improper.—*Ib.* 1.

BIGAMY.

10. *Two crimes are punishable under section 4185 of the Code.*—Section 4185 of the Code declares two offences of different elements, but of the same general character, and punishable in the same manner. *Brewer v. The State*, 101.
11. *Bigamy can be prosecuted only in the county where the marriage was solemnized.*—One of these offences (bigamy) can be prosecuted and punished only in the county in which the unlawful marriage was solemnized; the other is complete and punishable in any county in which the parties “continue to cohabit” after the unlawful marriage.—*Ib.* 101.
12. *An acquittal of the former crime does not prevent an indictment for the latter.*—An acquittal of the former of these crimes is no bar to an indictment for the other.—*Ib.* 101.

CHANGE BILLS.

13. *The statute is intended to suppress illegal currency.*—The purpose of the statute (Code of 1876, § 4433), forbidding the emission of change bills to circulate generally, as money, was intended to suppress the evils of an unauthorized paper currency.—*Durr v. The State*, 24.
14. *Every form of illegal currency is forbidden.*—The statute is not directed against paper of any particular form or character. If the purpose of its emission be, that it shall pass and circulate generally as money for an indefinite period, it falls within the statutory prohibition.—*Ib.* 24.
15. *Paper not transferable, is not violative of the statute.*—A paper which authorizes a person named in it to purchase goods on the credit of the drawer to a specified amount, and expresses on its face that it is not transferable, can not enter into general circulation as money, and is not within the purview of the statute.—*Ib.* 24.

CHANGE OF VENUE. See that Title.

CHARGE TO JURY. See that Title.

DISORDERLY HOUSE.

16. *The opinion of a witness as to the character of a house is not legal evidence.*—If, on the trial of a person indicted for keeping a bawdy-house, it is proven that the house is frequented by persons of dissolute habits, and its inmates are reputed to be lewd, it is permissible to show that the character of the defendant is bad. But the opinion

CRIMINAL LAW—DISORDERLY HOUSE—*Continued.*

of witnesses that the house is a bawdy-house, or a nuisance, is not admissible as evidence.—*Sparks v. The State*, 82.

ELECTION.

17. *A false pretence twice repeated is not a case for election.*—Goods obtained from one person by the same false pretence, twice repeated on different days, constitutes only one transaction, and is not a case for election.—*Beasley v. The State*, 20.
18. *The law does not require an election to be made when several sales are proven.*—When the testimony shows more than one sale on the Sabbath, the doctrine of election does not apply. The different sales are merely evidences of the intent with which the store is kept open.—*Snider v. The State*, 64.

EMBEZZLEMENT.

19. *Embezzlement can not be committed with different intents.*—An indictment charging that the defendant converted one hundred and eighty dollars, or other large sum of money, is fatally defective. The offence is not one that may be committed with different means or intents, or which may lead to different results; nor is it a case of several offences of the same character.—*Noble v. The State*, 73.
20. *The agent of the auditor, who substitutes one currency for another of less value, is guilty of felony.*—A person who, representing and acting for the auditor in his official character, receives national currency as a part of the revenue of the State, and substituting for it a currency of less value, knowingly converts or applies any part of it to his own use, or to the use of another person, is guilty of a felony.—*Ib.* 73.
21. *The conversion of money by the collector is punished under the funding act of 1873.*—The unlawful conversion of money, which the officer himself collected from the tax-payer, is punishable under section fourteen of the funding act of 1873.—*Ib.* 73.
22. *Every conversion of revenue is not indictable.*—It is not every conversion of the revenue which will constitute an indictable offence. A substitution of money of the same class, of equal or greater value, will not necessarily be criminal; hence, in prosecutions under the statute, the intent with which the substitution is made becomes material, and any relevant evidence to show the value of the substituted currency is admissible.—*Ib.* 73.
23. *Bank-notes included under the name of money.*—Since the introduction and free use of bank-notes and treasury-notes as a circulating medium and standard of value, they are understood to be embraced in the generic term money, as much as the authorized coin of the country.—*Ib.* 73.

EVIDENCE.

24. *The measure of evidence necessary to sustain indictments.*—Indictments under the Code are abridged in form, and contain legal conclusions rather than the facts which support them, but the nature of the offence is not changed, and the conclusions stated must be sustained by the same measure of evidence, which would be necessary if the facts on which they depend were fully expressed.—*Simpson v. The State*, 1.
25. *A confession alone will not sustain conviction.*—An extra-judicial confession not corroborated by independent evidence of the *corpus delicti*, will not support a conviction for a felony.—*Johnson v. The State*, 37.
26. *A confession must be shown to be voluntary.*—An extra-judicial confession can not be received against the prisoner unless it is shown to be voluntary, and this must be determined by the court.—*Ib.* 37.

CRIMINAL LAW—EVIDENCE—Continued.

27. *A confession is shown to be voluntary by answers to certain questions.*
Whether or not a confession was voluntary, is usually shown by negative answers to questions inquiring if the prisoner has been told it would be better for him to confess, or worse for him if he did not, and the like; but a better test is a fair consideration of the age, condition, situation and character of the prisoner, and all the circumstances attending the confession.—*Ib.* 37.
28. *A voluntary confession may be admitted without questions.*—If the confession thus tested is shown to be voluntary, it is not error to admit it, although the preliminary questions, respecting the threats or promises made, may not have been asked.—*Ib.* 37.
29. *Hearsay as to ownership of property inadmissible.*—The evidence of a third person that the prosecutor identified the money found on the prisoner as that which had been stolen from her, is mere hearsay, and not admissible against the prisoner; and the absence of the prosecutor from the State at the time of the trial will not render such evidence legal.—*Ib.* 37.
30. *A preponderance of probabilities will not sustain a conviction.*—On a trial of a criminal offence, it is error to refuse a charge asked in writing, "that the defendant is presumed to be innocent until his guilt is established, and the evidence to induce or authorize a conviction should not be a mere preponderance of probabilities, but should be so strong and convincing as to lead the mind to the conclusion that the accused can not be guiltless."—*Coleman v. The State*, 52.
31. *Advice of probate judge inadmissible as evidence.*—The court did not err in refusing to receive testimony that, before the alleged marriage, the probate judge informed the defendant it was lawful for him to marry a white woman.—*Hoover v. The State*, 57.
32. *An unlawful act, intentionally done, is a crime.*—To constitute a crime, there must be both an intent and an act; if the act is intentionally done, the criminality necessarily follows.—*Ib.* 57.
33. *Marriage may be proved by confession and cohabitation.*—Marriage may be proved by cohabitation and the confession of the parties. Whether these are sufficient and convincing evidence of the fact depends on their connection and consistency with other facts which may be found in the particular case.—*Ib.* 57.
34. *The judge must pay strict attention to the evidence.*—It is the duty of a judge, both in civil and criminal cases, to give strict attention to the evidence; and to propound to the witnesses such questions as he may deem necessary to elicit any relevant and material evidence, without regard to its effect upon the interest of either party; the development and establishment of the truth is his purpose and duty.—*Sparks v. The State*, 82.
35. *The questions of a judge or juror should arise out of the evidence.*
The questions a judge, or juror, propounds to witnesses should be such as are suggested by the evidence given on trial.—*Ib.* 82.
36. *Oral proof of the marriage is admissible.*—Under an indictment for either of the offences declared in section 4185 of the Code, oral proof of the marriage is admissible.—*Brewer v. The State*, 101.
37. *The evidence of an accomplice relative to ownership of property is not required to be supported.*—When the testimony of an accomplice, which connects the prisoner with the larceny of property, is corroborated, his evidence relative to its ownership would authorize a conviction although it is supported by no other witness.—*Smith v. The State*, 104.
38. *In one particular, the evidence of an accomplice must be corroborated.*
To authorize a conviction under an indictment for a felony on the testimony of an accomplice, that part of his evidence which connects

CRIMINAL LAW—EVIDENCE—*Continued.*

the accused with the commission of the crime must be corroborated. But it is immaterial whether or not it is corroborated in other particulars.—*Ib.* 104.

39. *A question relative to possession of land may be asked.*—On the trial of a person indicted for larceny of timber, the question "who was in possession of the land on which the stick of timber grew," was proper, because it was an inquiry concerning a fact, and not a legal conclusion.—*Morningstar v. The State*, 30.
40. *A witness can not testify as to the appearance of the prisoner.*—Evidence that the prisoner "looked downcast" expresses merely the opinion of the witness, and is not admissible.—*McAdory v. The State*, 92.

GAMING.

41. *The managers of a club are indictable, if gaming on the premises is permitted.*—The managers of a social club whose members alone are permitted to buy spirituous liquors, sold in its rooms, may be indicted for permitting gaming on the premises.—*Jacobi v. The State*, 71.
42. *The words "device" and "substitute" have different meanings.*—The words "device," and "substitute," used in section 4207 of the Code, do not have the same meaning; hence a charge directing the acquittal of the defendant on trial, unless the jury was satisfied he played with the means specified in the statute only, is properly refused.—*Henderson v. The State*, 89.
43. *A point near a public road is a public place.*—A place in the bushes on the edge of an old field in the corporate limits of a town, about forty yards from a public road, and near and in view of a path used by children going to school, and other persons, is a public place within the meaning of the statute against gaming.—*Ib.* 89.
44. *The fact of gaming must be ascertained by the jury.*—When it is proven that the defendant and his companions, holding cards in their hands, were sitting on the ground at a place where they had frequently played cards, it is for the jury to determine from the facts whether or not the defendant was playing.—*Ib.* 89.

INDICTMENT.

45. *The christian name of the owner must be stated.*—An indictment which does not contain the christian name of the owner of the property stolen, or does not aver that it is to the grand jury unknown, is defective.—*Johnson v. The State*, 37.
46. *When demurrer is not in the record it is presumed to be to the whole indictment.*—When the judgment-entry recites that defendant demurred to the indictment, but the demurrer is not contained in the record, the appellate court will presume it was interposed to the whole indictment; and if it embraces several counts, one of which is good, a refusal to sustain the demurrer is not error.—*Cheatham v. The State*, 40.
47. *Indictment must charge want of license.*—An indictment for selling sewing machines without license, must charge that the accused did engage in, or carry on the business of selling, and did sell sewing machines without first having paid for, and obtained a license therefor; and that at the time he did engage in, or carry on the business of selling sewing machines, he was either a member of the sewing machine company, or its agent.—*Merritt v. The State*, 46.
48. *Judgment-entry must show action of the court on demurrer.*—A demurrer to an indictment will not be considered by the appellate tribunal, when the action of the inferior court upon it is not shown in the judgment-entry.—*Ib.* 46.
49. *An indictment laying property in a servant is insufficient.*—A superintendent of another's plantation is the servant of the employer; and an

CRIMINAL LAW—INDICTMENT—*Continued.*

- indictment for larceny, which charges that the corn stolen was the property of such superintendent, is insufficient.—*Heygood v. The State*, 49.
50. *A common law indictment is valid under the Code.*—An indictment good at common law for a common law offence, is sufficient under our statutes.—*Sparks v. The State*, 82.
51. *The intendment of an indictment as to venue must be sustained by proof.* It is an intendment, or implication of law that the offence stated in any indictment was committed in the county in which the indictment is found; but a failure on the trial, to support by evidence the indictment or implication, is fatal.—*Id.* 82.
52. *Every charge must contain a substantial offence.*—Where two or more offences are laid in the same count disjunctively, each separate alternative charge must contain a substantive offence, charged with that degree of certainty which the statute requires.—*Noble v. The State*, 73.
53. *Certainty in an indictment is essential.*—In this case, the indictment is nothing more than a charge that the defendant knowingly converted or applied to his own use a large sum of money. This would be fatally uncertain and defective in a civil proceeding, and is equally so in an indictment.—*Id.* 73.

INFAMY.

54. *A conviction by the mayor of a town does not infamize the convict.*—A conviction before the mayor, or other officer of a municipal corporation, of the violation of a municipal ordinance against stealing, obtaining goods by false pretences, or violence, does not render the person incompetent to testify on the ground of infamy.—*Cheatham v. The State*, 40.

JURISDICTION.

55. *Jurisdiction of Circuit Court ceases when that of County Court attaches.* The statute, "in relation to the trial of misdemeanors in Tuscaloosa and other counties therein named," requiring the Circuit Court to transfer to the County Court indictments for misdemeanors, declares the transfer must be ordered, and the papers, with a certified copy of all docket entries and minutes of proceedings had therein, delivered to the County Court before the jurisdiction of the County Court ceases.—*Green et al. v. The State*, 68.
56. *Until order of transfer is made, jurisdiction does not cease.*—No order of transfer had been made in this case; neither the jurisdiction of the Court had attached, nor that of the Circuit Court had terminated. A demurrer to a plea to the jurisdiction of the Circuit Court was, in view of these facts, properly sustained.—*Id.* 68.

JURY.

57. *An objection to a list of jurors may be waived.*—A prisoner on trial for a capital felony may waive an objection that the list of special jurors summoned and served on him, contains fewer names than the law requires; or that the name of the same person appears twice on the list. If he calls the attention of the court to the irregularity or mistake, before trial, but makes no motion, based on the irregularity, or otherwise objects to it, he can not, after verdict, move an arrest of judgment, or in any manner avail himself of it.—*Bell v. State*, 55.
58. *Whether or not a store is kept open for the purpose of traffic is a question for the jury.*—The purpose for which a store is kept open on Sunday is necessarily a question of fact to be found by the jury, under proper instructions. The transaction should be carefully scrutinized, and if on all the evidence the jury are convinced, to a moral certainty, tha

CRIMINAL LAW—JURY—*Continued.*

- there was in fact a sale, and that it was so intended at the time, then they should not hesitate to render a verdict of guilty.—*Snider v. The State*, 64.
59. *A peremptory challenge is not allowed after the juror has been accepted by both parties.*—A peremptory challenge of a juror will not be allowed after the solicitor and the defendant have each expressed satisfaction with the jury as organized. But a challenge for cause may be permitted, if the cause existed and was not sooner discovered or improperly withheld.—*Sparks v. The State*, 82.
60. *The jury must ascertain whether the business was carried on*—Whether or not the sale of two or three sewing machines is sufficient to warrant a conviction for engaging in, or carrying on such a business, is a question for the jury.—*Merritt v. The State*, 46.

KEEPING OPEN STORE ON SUNDAY.

61. *Keeping open store for traffic on Sunday, is punishable.*—Under section 4443 of the Code, a merchant or shop-keeper, who keeps open store on Sunday, is not punishable, unless the store is kept open for the purpose of traffic.—*Snider v. The State*, 64.
62. *Merely keeping a store open on Sunday without traffic is no violation of law.*—Sabbath traffic, particularly in intoxicating liquors, is offensive to a religious community; and the statute intended for its repression should be faithfully enforced. But merely keeping the doors of a store open on the Sabbath is not a violation of the law, unless there is traffic on that day.—*Ib.* 64.

LARCENY.

63. *A license may be granted by parol.*—For the purpose of showing, in such a case, that the accused did not take and carry away the timber, *animus furandi*, it is not necessary that the defendant should show a deed of conveyance. A purchase by parol from a person who owned the land, or was believed by him to be the owner of it, would be sufficient. Such a sale, while acknowledged by the party making it, might operate at least as a license to take the tree if it belonged to the vendor.—*Morningstar v. The State*, 30.
64. *An indictment laying property in a servant is insufficient.*—A superintendent of another's plantation is the servant of the employer; and an indictment for larceny, which charges that the corn stolen was the property of such superintendent, is insufficient.—*Heggood v. The State*, 49.
65. *In one particular, the evidence of an accomplice must be corroborated.* To authorize a conviction under an indictment for a felony on the testimony of an accomplice, that part of his evidence which connects the accused with the commission of the crime must be corroborated. But it is immaterial whether or not it is corroborated in other particulars.—*Smith v. The State*, 104.
66. *The evidence of an accomplice relative to ownership of property is not required to be supported.*—When the testimony of an accomplice, which connects the prisoner with the larceny of property, is corroborated, his evidence relative to its ownership would authorize a conviction although it is supported by no other witness.—*Ib.* 104.
67. *Hearsay as to ownership of property inadmissible.*—The evidence of a third person that a prosecutor identified the money found on the prisoner as that which had been stolen from her, is mere hearsay, and not admissible against the prisoner; and the absence of the prosecutor from the State at the time of the trial will not render such evidence legal.—*Johnson v. The State*, 37.

CRIMINAL LAW—Continued.

MARRIAGE.

68. *Intermarriage of white and black persons forbidden.*—The marriage of a white woman and a black man is absolutely void; and the offending parties must be treated as unmarried persons, and their sexual cohabitation as fornication, within the statute.—*Hoover v. The State*, 57.
69. *Advice of probate judge inadmissible as evidence.*—The court did not err in refusing to receive testimony that, before the alleged marriage, the probate judge informed the defendant it was lawful for him to marry a white woman.—*Ib.* 57.
70. *An unlawful act, intentionally done, is a crime.*—To constitute a crime, there must be both an intent and an act; if the act is intentionally done, the criminality necessarily follows.—*Ib.* 57.
71. *Marriage may be proved by confession and cohabitation.*—Marriage may be proved by cohabitation and the confessions of the parties. Whether these are sufficient and convincing evidence of the fact depends on their connection and consistency with other facts which may be found in the particular case.—*Green v. The State*, 68.
72. *A charge that declarations and conduct were evidence is calculated to mislead.*—An instruction to the jury, at the request of the defendants, that their declarations and conduct were evidence of marriage, without explanation or qualification, would confuse and mislead, and was properly refused.—*Ib.* 68.

MURDER.

73. *Death caused by an obstruction wrongfully placed on a railroad track is murder.*—If a train of railroad cars is thrown from the track by obstructions wrongfully placed upon it, and a human being is killed, the person committing the act is guilty of murder in the first degree.—*Presley v. The State*, 98.
74. *The degree of homicide caused by a mischievous engine planted on the premises, depends on the nature of the weapon.*—If an owner of land, by means of spring-guns, or other mischievous weapons planted on his premises, causes death, he is guilty of criminal homicide. Its degree will depend on the nature of the instrumentality used. If it be a deadly weapon, the killing will be murder.—*Simpson v. The State*, 1.
75. *Life can not be taken to prevent a mere trespass.*—It is a principle of the criminal law of the State, that for the prevention of a mere trespass upon property—not the dwelling-house—human life can not be taken, or grievous bodily harm inflicted; consequently, if in the defence of property, other than the dwelling-house, life is taken with a deadly weapon, it is murder, although the homicide may be actually necessary to prevent the trespass.—*Ib.* 1.
76. *The protection due to property is not enlarged by the secrecy of the trespass.*—The law declares with certainty the protection due to property, and defines the force which may be employed in the defence. And neither the secrecy of the trespass, nor the frequency of its repetition enlarges the one or the other.—*Ib.* 1.

OBTAINING GOODS UNDER FALSE PRETENCES.

77. *All the false pretences need not be proven.*—It is not material in an indictment for this offence, to aver all the pretences made, or to prove all that is averred, if those charged and proved are intended and calculated to deceive and defraud, and on the strength of them, or any one of them, the valuable commodity or thing is obtained.—*Beasley v. The State*, 20.
78. *Every pretence may not be false.*—The falsity of every pretence made is not always necessary to a conviction. It is enough if a material part of the pretence be false; that it be made with intent to defraud; and

CRIMINAL LAW—OBTAINING GOODS UNDER FALSE PRETENCES—*Cont'd.*

that it induces the person sought to be wronged to part with his property. These are inquiries for the jury, under proper instructions. *Ib.* 20.

79. *A false pretence twice repeated is not a case for election.*—Goods obtained from one person by the same false pretence, twice repeated on different days, constitutes only one transaction, and is not a case for election.—*Ib.* 20.

PLACING OBSTRUCTIONS ON A RAILROAD.

80. *Death caused by an obstruction wrongfully placed on a railroad track is murder.*—If a train of railroad cars is thrown from the track by obstructions wrongfully placed upon it, and a human being is killed, the person committing the act is guilty of murder in the first degree.—*Presley v. The State*, 98.

RETAILING WITHOUT LICENSE.

81. *Retailing is one offence; engaging in the business of retailing another.* Our statutes carefully distinguish between the two offences of retailing spirituous liquors without license, and engaging in the business of retailing without license under the revenue law. Under the former, a single act constitutes the offence; under the latter, the accused must *engage in the business of* retailing, before a conviction would be lawful. *Martin v. The State*, 34.
82. *Agency of unlicensed corporation is no defence.*—It is no defence to an indictment for retailing liquor without license, that the accused acted merely as the agent of a corporation, unless it had been properly licensed.—*Ib.* 34.
83. *It is no defence that corporation sold liquor only to its members.*—Nor is it a defence that the accused was merely the agent of a corporation which owned the liquor and the bar where it was sold; that no one but members or stockholders, or those specially invited, could gain admission to the room; and that liquor was sold to none but members, and the money paid went into the treasury of the corporation.—*Ib.* 34.
84. *Such a sale is indictable.*—By such a sale, the absolute property in the liquor which belonged to the corporation is transferred for a valuable consideration to another person, and such sale without a license is an indictable offence.—*Ib.* 34.

SELF-DEFENCE.

85. *Self-defence, except in extreme cases, can not endanger life.*—Every one has the right to defend his person and property against unlawful violence, and may employ as much force as is necessary to prevent injury. But this principle is subject to the qualification that he shall not, except in extreme cases, endanger life, or inflict great bodily harm.—*Simpson v. The State*, 1.

SELLING SEWING MACHINES WITHOUT LICENSE.

86. *Indictment must charge want of license.*—An indictment for selling sewing machines without license, must charge that the accused did engage in, or carry on the business of selling, and did sell sewing machines without first having paid for, and obtained a license therefor; and that at the time he did engage in, or carry on the business of selling machines, he was either a member of the sewing machine company, or its agent.—*Merritt v. The State*, 46.
87. *The jury must ascertain whether the business was carried on.*—Whether or not the sale of two or three machines is sufficient to warrant a conviction for engaging in, or carrying on such a business, is a question for the jury.—*Ib.* 46.

CRIMINAL LAW—SELLING SEWING MACHINES WITHOUT LICENSE.—*Con'd.*

88. *Judgment-entry must show action of the court on demurrer.*—A demurrer to an indictment will not be considered by the appellate tribunal, when the action of the inferior court upon it is not shown in the judgment-entry.—*Ib.* 46.

SPRING-GUNS.

89. *It is unlawful to plant spring-guns.*—The common law of England is not in all respects the common law of this country; and the rule which once prevailed there, that allowed the owner of property to set spring-guns to protect it against trespassers, is inconsistent with our customs and institutions, and has never obtained in this State. *Simpson v. The State*, 1.

VAGRANCY.

90. *A lewd woman supported by her parents is not a vagrant.*—A minor supported by her parents who have an honest occupation, can not be convicted of vagrancy, although she may be a lewd woman.—*Taylor v. The State*, 19.

WAIVER.

91. *An objection to a list of jurors may be waived.*—A prisoner on trial for a capital felony may waive an objection that the list of special jurors summoned and served on him, contains fewer names than the law requires; or that the name of the same person appears twice on the list. If he calls the attention of the court to the irregularity, or the mistake, before trial, but makes no motion, based on the irregularity, or otherwise objects to it, he can not, after verdict, move an arrest of judgment, or in any manner avail himself of it.—*Bell v. The State*, 55.

WITNESSES.

92. *A witness may be recalled.*—It is within the discretion of the court to have a witness recalled and further cross-examined, after he has been discharged from the witness stand.—*Morningstar v. The State*, 30.
93. *The judge should not converse with a witness privately.*—It is not within the province of a judge to converse privately, either in or out of court, with a witness, to ascertain whether he has knowledge of particular facts; or to suggest to the witness, after his examination, that there are facts, other than those to which he has testified, within his knowledge.—*Sparks v. The State*, 82.
94. *A witness can not testify as to the appearance of the prisoner.*—Evidence that the prisoner "looked downcast" expresses merely the opinion of the witness, and is inadmissible.—*McAdory v. The State*, 92.

DAMAGES.

1. *The falsity of the facts stated in the affidavit must be alleged.*—In an action to recover damages for the wrongful suing out of an attachment, the plaintiff must aver the falsity of the particular fact or facts which are stated in the affidavit of the ground of the attachment. *Durr et al. v. Jackson*, 203.
2. *An employee can maintain action for damages against employer when in fault.*—An employee, who is injured in the course of his service, has recourse against the employer for damages when the injury is caused by the fault of the employer; but not, when it is caused by the fault or negligence of another employee, unless the employer is chargeable for the employment of an incompetent person.—*Mob. and Mont. Railr. Co. v. Smith*, 245.

DAMAGES—*Continued.*

3. *A corporation is liable for damages caused by the employment of unfit persons.*—If a railroad corporation authorizes an officer to employ persons to maintain and repair the road, and to carry on its business, and he employs, or retains persons unfit for the service in which they are engaged, and injury results to another employee of the corporation from this cause, it is liable. The officer in such matters is substituted for the corporation, and his negligence is the negligence of the corporation.—*Ib.* 245.
4. *A corporation is liable for damages arising from the improper selection of an officer.*—When the duties entrusted to an officer are such as can not properly be performed by the corporation itself, then his negligence is not that of the corporation, unless it has failed to exercise due care in the selection of a proper officer.—*Ib.* 245.
5. *The nature of the duties required, determines the character of the employee.*—It is not the relative grades of different officers or employees, or the subordination of the one to the other, which determines when they are fellow-servants in relation to their common employer; but it is the nature of the duty intrusted to them.—*Ib.* 245.
6. *The act of February 5th, 1872, explained.*—The act to prevent homicides, approved February 5th, 1872, was intended not merely to give compensation for the lost earnings of the slain by the wrongful act or omission of another, but is also punitive in its purpose; and its provisions apply as well to corporations as to natural persons.—*South & North Ala. R. R. Co. v. Sullivan*, 272.
7. *The damages received under that act become assets of the estate.*—The compensation given by the act does not go to the husband, wife, or child of the deceased, as such, but becomes assets of the estate, not subject to the payment of debts, and must be distributed as the personalty of an intestate is now distributed.—*Ib.* 272.
8. *The personal representative of the decedent must sue.*—The damages given must be recovered by the personal representative of the decedent; and when the person killed was a married woman, the law does not require the suit to be brought by the husband.—*Ib.* 272.
9. *A release given by the husband is no defence to a suit brought by the personal representative.*—A release given by the husband to a corporation by whose wrongful act or omission the wife was killed, is no bar, or defence to an action brought by her representative to recover damages.—*Ib.* 272.
10. *Damages caused by imperfect cultivation will not support an attachment for rent.*—Damages caused by the imperfect cultivation of rented land, can not be ascertained by calculation, or be the subject of an affidavit. Consequently, they will not support an attachment for rent, or justify a landlord's possession of the crop, against an older mortgagee whose mortgage has been duly recorded.—*Wilkinson v. Ketter*, 206.
11. *Sections 2222 and 2223 of the Code are highly penal.*—Sections 2222 and 2223 of the Code of 1876, are highly penal, and must be strictly construed. They do not authorize the institution of a suit against the transferee of the mortgage.—*Grooms v. Hannon*, 510.
12. *In a suit against a corporation by an employee, it may recoup damages caused by his fault.*—A railroad corporation may recoup damages resulting from the negligence of an employee in the performance of his contract of service, when sued by the employee to recover his wages.—*Mob. & Mont. Railw. Co. v. Clanton*, 392.
13. *A corporation may sue an employee for damages caused by his negligence.*—When damage results to cars and other property of a corporation from the negligence of an employee in the performance of his duties, it may recover damages in an action against him.—*Ib.* 392.
14. *The measure of damages in such a case is fixed by a legal standard.*

DAMAGES—*Continued.*

The measure of damages in such a case is fixed by a legal standard, and the corporation having the right to maintain an action against the employee, it may, when sued by him to recover wages, set-off by plea such damages, and if the facts justified it, recover a judgment for the excess.—*Ib.* 392.

15. *The imperfect equipment of a train will not excuse negligence in an employee.*—The imperfect equipment of a train does not relieve the conductor from the exercise of due care and diligence in its management.—*Ib.* 392.
16. *The damage caused by a breach of covenant of seisin, is the purchase-money with interest.*—In a recovery based on a broken covenant of seisin, the measure of damage is the purchase-money paid, with interest.—*Bibb, Adm'x v. Freeman et al.* 612.

DEED. See CONVEYANCE.

DETINUE.

1. *Section 3120 applies only to actions for money.*—Section 3120 of the Code applies only to actions for money, and not to actions for the conversion or detention of personal property.—*Haws v. Morgan*, 508.

DOWER.

1. *A reference to the register for the purpose of ascertaining the value of the statutory estate of a married woman is proper.*—When it is decreed that complainant is entitled to dower in certain lands, unless she has a statutory separate estate equal in value to her dower interest, a reference to the register to ascertain and report the extent of her statutory estate and the value of her dower interest, is a convenient method of ascertaining facts; and is not objectionable on the ground that it refers for determination of the master, matters on which the equities of the bill rest.—*Barnes et al. v. Carson*, 188.

EJECTMENT.

1. *A court of equity will not enjoin an action of ejectment brought to recover land not conveyed by deed.*—A court of equity will not enjoin an action of ejectment brought for the recovery of land, sold for Confederate treasury-notes, when no deed of conveyance had been executed, and the promissory note given for the purchase-money, had matured after the surrender of the Confederate armies in 1865.—*Daughdrill v. Edwards*, 424.
2. *A deed must be attested by at least one subscribing witness or acknowledged.*—An instrument intended to convey lands is inoperative to transfer the legal title, unless, if the grantor can write, it is attested by at least one subscribing witness, or execution of it is acknowledged by the grantor in the manner prescribed by law.—*Bank of Kentucky v. Jones*, 123.
3. *Unless the plaintiff shows such a deed, or that it once existed, he can not recover.*—On a trial of an action of ejectment a plaintiff who does not exhibit such a title to the land in controversy, or prove that such a deed once existed, is not entitled to recover.—*Ib.* 123.

ERROR AND APPEAL.

1. *An appeal from the judgment of a justice of the peace will not be dismissed because the bond contains no penalty.*—A motion to dismiss an appeal from the judgment of a justice of the peace, because the appeal bond contains no penalty, is properly overruled.—*Ruffin v. Hines*, 565.
2. *A case on an appeal from a judgment of a justice of the peace, is tried de novo.*—On an appeal from the judgment of a justice of the peace

ERROR AND APPEAL—*Continued.*

- the trial is *de novo*, and a motion to vacate the judgment because the service of process does not appear, is properly overruled.—*South & North Ala. R. R. Co. v. Seale*, 608.
- 3. *All errors will not cause a reversal.*—For an error without injury, a judgment will not be reversed.—*Hirschfelder v. Keyser*, 338.
- 4. *The action of the court on a demurrer to useless pleas will not be considered.*—Where a case according to the proof properly turned on a plea of *non-assumpsit*; and special pleas were unnecessary, and no result could have been brought about by their interposition, the court will not consider the rulings on demurrer.—*Street v. Kelley & Co.* 355.
- 5. *If the facts show the plaintiff has no right, error will not cause a reversal.* If all the facts in a case show that the plaintiff is not entitled to recover, the appellate tribunal will not reverse the judgment of the Circuit Court, if it should err in its rulings on demurrer, or in receiving evidence.—*Ib.* 355.
- 6. *The consideration of a question by the court may be waived by the parties.* The appellate court will not consider a question which the record shows has been waived by an agreement of the parties.—*Bibb v. Hawley*, 403.
- 7. *The omission of an indispensable party is available on error.*—The omission of an indispensable party is available on error, although no objection was made on this account in the court of chancery.—*Ib.* 403.
- 8. *Errors in judicial proceedings must be corrected by an appeal.*—A party who has had his day in court, has fully presented his evidence, and on it the court has pronounced judgment, if error intervene, must correct it on appeal.—*Bowden v. Perdue*, 409.
- 9. *When the record shows the plaintiff has no right to recover, an error of the court will not cause a reversal.*—When a complaint contains no substantial cause of action, and shows upon its face that, by no allowable amendment could a judgment be sustained upon it, the errors of the inferior court will not cause a reversal. They are errors without injury.—*Grooms v. Hannon*, 510.
- 10. *A judgment by default without service of process will be reversed.*—A judgment by default will be reversed when the record does not show that the defendants were served with process.—*Shupard v. Lewis*, 606.

ESTOPPEL.

- 1. *As a rule, the acts of an infant will not operate as an estoppel en pais.* The guardian of infants can not estop them from asserting title to their land sold without authority of law, by an unauthorized receipt of the purchase-money; nor can infants, as a general rule, do any act which will amount to an *estoppel en pais*.—*Gillespie et al. v. Nubors et al.* 441.

EVIDENCE.

- 1. *A presumption in favor of the truth of the writing arises from lapse of time.*—But if a party deliberately, and with a full knowledge of its contents, voluntarily executes an instrument in writing, and acquiesces in its statements for several years, and so acts as to induce the holder thereof to rest in security upon the validity of the contract, a strong presumption arises that the writing speaks the truth, and this can be repelled only by satisfactory evidence.—*Blum & Co. v. Mitchell*, 535.
- 2. *An answer not verified by oath is a mere pleading.*—An answer to a bill in equity, not verified by oath, must stand as a mere pleading, and should not otherwise be construed. Any admissions it may contain would be evidence for the complainant; and if its statements of matters of defence varied from the evidence, the evidence would be inadmissible, because there would be no pleading to authorize its introduction.—*Ib.* 535.

EVIDENCE—*Continued.*

3. *Discrepancies between an answer and the depositions of a defendant do not necessarily affect his credibility.*—Discrepancies between the allegations of a defendant's answer, not sworn to, and his depositions, do not necessarily affect his credibility or lessen the force of his evidence. *Ib.* 535.
2. *Evidence not offered on the reference can not be considered.*—If, in such a case, after due notice, the register reports there was no evidence that complainant had a statutory estate, and the report is confirmed, depositions, showing that complainant was in possession of other realty, but not showing the nature of her estate therein, and not offered as evidence on the reference, can not be considered for the purpose of reversing the decree.—*Barnes et al. v. Catson*, 188.
3. *Evidence to controvert a debt on which a judgment is founded, is inadmissible.*—Evidence can not be introduced for the purpose of controverting the debt on which a judgment is founded. Such a judgment affirms the existence of the debt, and is conclusive between the parties whenever the fact of indebtedness is again in issue between them, directly or collaterally.—*Durr et al. v. Jackson*, 203.
4. *Evidence may be admissible for one purpose and inadmissible for another.*—Evidence is often admissible for one purpose, when inadmissible for another and distinct purpose. A party apprehending injury from its admission, can, by requesting proper instructions from the court, confine its operations to its lawful purpose.—*Ib.* 203.
7. *In questions of fraud, all evidence that throws light on the transaction, is admissible.*—If the question be one of fraud, whatever fact tends to show the good or bad faith of a party throughout the whole transaction, is properly admissible in evidence. But illegal testimony, whether given by a witness in open court, or in a deposition, may be objected to, and should be excluded at any stage of the proceedings. *Ib.* 203.
8. *The certificate of the auditor is presumptive evidence of the act or omission upon which motion is based.*—The certificate of the auditor is presumptive evidence of the act or omission upon which the motion is founded, and of the amount due the State. It is not required by law to be based alone on the returns on file in his office; when necessary, and he must judge of the necessity, he may resort to other sources of information, and predicate the certificate of facts derived from them.—*Timberlake et al. v. Brewer*, 108.
9. *Its admissibility can not be questioned on account of the information on which the auditor acted.*—The admissibility of the certificate can not be questioned, nor its force as evidence lessened, because of the sources of information on which the auditor may have acted. It conforms to the statute if it states the omission of the tax-collector to pay the amount of taxes collected by him into the State treasury, and the amount due the State.—*Ib.* 108.
10. *It is the duty of the judge of probate to make an abstract of the assessment.*—It is the duty of the judge of probate of each county, within five days after the adjournment of the board of equalization, to make and certify to the auditor a complete abstract of the assessment of all real and personal property in his county, showing the total amount and value of each class contained therein. If he discovers, after discharging the duty, that there are errors in the addition, he may lawfully correct them, and transmit a supplemental abstract to the auditor. The abstract, when filed in the office of the auditor, becomes a paper pertaining to the office, and is made evidence by the statute. *Ib.* 108.
11. *An expert may show that the addition is correctly made.*—An expert, whether employed or not, who has examined the assessment book, and added up the entries in the different columns, may, with the book

EVIDENCE—*Continued.*

- before the jury, point out the errors in addition previously made; the additions, as correctly made, and the true aggregate amount of the value of the taxable property of the county as shown by the book. *Ib.* 108.
12. *It is error to give a charge not sustained by the evidence.*—Charges given by the court, at the request of the plaintiff, and founded on recitals of facts of which no evidence whatever was submitted to the jury, are erroneous, and will cause a reversal of the judgment.—*Bank of Kentucky v. Jones*, 123.
 13. *The recital of a deed is not evidence against a creditor of the grantor.* In a controversy between the grantee and a creditor of the grantor, relative to the validity of the conveyance, its recital of the consideration is merely an admission of the grantor, and is not evidence against the creditor.—*Hubbard et al. v. Allen*, 283.
 14. *In such a contest the onus of proving the value and adequacy of the consideration is upon the grantor.*—In such a contest the onus of proving that the conveyance was founded on an adequate and valuable consideration, is cast upon the grantee; and without regard to the motives of the parties in its execution, as to the rights of existing creditors, the deed will be presumed to be fraudulent until the contrary is shown.—*Ib.* 283.
 15. *Evidence of a consideration different in kind from that expressed is inadmissible.*—Although the nature of the consideration may not be changed, any consideration of the same kind, and not inconsistent with that recited, may be proven; and if it be adequate, will support the conveyance.—*Ib.* 283.
 16. *The sufficiency of proof is affected by the relationship of the parties.* If the grantor's creditors assail a deed, the sufficiency of proof of the consideration will depend on the relationship of the parties; on the circumstances when the transaction was made, and their subsequent conduct: and if a connection by blood, or marriage, be shown, clear and more convincing proof will be demanded, than would be required in its absence.—*Ib.* 283.
 17. *If a payment be disputed, the party affirming it must prove it.*—If a payment be disputed, the burden of proving it lies on the party affirming it; and when the debtor asserts that he directed the appropriation of a partial payment, the burden of showing it rests on him. *Leegstein & Simon v. Whitman et al.* 345.
 18. *The entries in the books of a partnership are presumed to be correct.* The books of a commercial partnership, and the entries therein, when all the members have free access to them, are evidence for and against the several partners in settling the partnership accounts. The entries are presumed to be correct until the contrary is shown.—*Routen et al. v. Bostwick et al.* 360.
 19. *Books of partnership are evidence for and against the partners.*—In a suit for the settlement of partnership accounts, the register on a reference, should receive such books as evidence for and against all the partners.—*Ib.* 360.
 20. *Books produced at the instance of complainant, are evidence against him.*—When a bill requires a defendant to produce books and papers in his possession, for the purposes of an account, on production, they become evidence against the complainant.—*Ib.* 360.
 21. *The introduction of superfluous evidence may authorize the admission of irrelevant testimony.*—A plaintiff by the introduction of unnecessary or superfluous evidence, may authorize the defendant to introduce testimony which would otherwise be irrelevant and inadmissible. *Flinn v. Barber*, 446.
 22. *A conductor of a train may be examined as an expert.*—A person who has acted continuously for more than seven years as a "railroad con-

EVIDENCE—Continued.

- ductor," can be examined as an expert, relative to the means of stopping railroad trains.—*Mob. & Mont. Railw. Co. v. Blakeley*, 471.
23. *The record of a judgment against the husband, is not evidence of the articles purchased.*—In a proceeding under the statute to subject the wife's statutory estate, after judgment against the husband, the record of such a recovery is not evidence that the items, composing the account, were articles of comfort and support of the household.—*Cheatham v. Newman*, 547.
24. *The silence of a party against whom a claim is asserted, may be proven.* The silence of a party against whom a claim or right is asserted, is a fact which may be shown in an action for the enforcement of such claim or right; and from it the jury may infer an admission of the truth of the assertion.—*Perry v. Johnston et al.* 648.
25. *No inference prejudicial to the party can be drawn from his silence relative to the remarks of a stranger.*—But the mere declarations of strangers, with whom the party has no connection, though made in his presence, may be best answered by silence; and from silence no inference against the party should be drawn.—*Ib.* 648.
26. *An acquiescence in a falsehood, for the purpose of profit, will avoid a contract.*—A tacit acquiescence in a misrepresentation made by another, the falsity of which is known, or the truth of which a vendor has not a reasonable belief, from which he intends to derive an advantage, may avoid the contract or give right to an action for damages.—*Ib.* 648.
27. *A sufficiency of proof is affected by the relationship of the parties.* If the grantor's creditors assail a deed, the sufficiency of proof of the consideration will depend on the relationship of the parties; on the circumstances when the transaction was made, and their subsequent conduct; and if a connection by blood, or marriage, be shown, clear and more convincing proof will be demanded, than would be required in its absence.—*Hubbard et al. v. Allen*, 283.

EXCEPTIONS.

1. *A general exception is defective, unless all the charges are illegal.* When a number of charges are given or refused, and only one exception to the action of the court is reserved, such exception will avail nothing unless all the charges excepted to, are erroneous.—*Beavers, Adm'r v. Hardie & Co.* 570.
2. *If no exception is reserved, the action of the court is not revisable.*—If no exception is reserved to the refusal of the court to allow the complaint to be amended by striking out the name of one of the plaintiffs, its action is not revisable.—*McNutt et al. v. Knight et al.* 597.
3. *If civil cases only exceptions reserved, and assigned, and insisted on as error, will be considered.*—In civil cases only such action of the court below as is excepted to, and assigned and insisted on as error in the appellate court, will be considered.—*Woodward v. Parsons*, 625.
4. *A general exception to a general charge is defective, unless the entire charge is erroneous.*—A general exception reserved to the general charge given by the court, which asserts several distinct propositions, some of which are correct, is defective, and does not require the appellate court to sift the charge with the view of ascertaining whether or not, some part of it is erroneous.—*South & North Ala. R. R. Co. v. Sullivan*, 272.

EXECUTORS AND ADMINISTRATORS.

1. *An executor or administrator has the legal title to choses in action in his hands for administration.*—An executor or administrator possesses the legal title and has absolute power to transfer or dispose of

EXECUTORS AND ADMINISTRATORS—Continued.

- chooses in action in his hands for administration. No *bona fide* dealing with him in this regard can be impeached.—*Hutchinson et al. v. Owen et al.* 326.
2. The indiscretion of an administration can not affect others fairly dealing with him.—The indiscretion of an executor or administrator can not be visited on those who deal fairly with him.—*Ib.* 326.
 3. After the lapse of forty days no one has the right to be preferred as an administrator.—After the expiration of forty days from the death of the intestate, no one has a right to be preferred as an administrator of the estate.—*Cunningham, Ex'r v. Thomas, Adm'r*, 158.
 4. The failure of an administrator to execute a bond does not vacate the appointment.—The failure of the administrator to execute bond in the penalty prescribed, is an irregularity, but it does not render the appointment void.—*Ib.* 158.
 5. A decree on irregular proceedings can not be vacated on petition at a subsequent term.—If the proceedings on the final settlement of an administration are not void, but irregular, the decree rendered thereon can not be set aside on petition at a subsequent term.—*Ib.* 158.
 6. Sureties on a bond of an administrator can not deny the validity of his appointment.—Sureties on the bond of an administrator who qualified and obtained possession of the assets of an estate, can not, when called to account for his breaches of duty, deny the validity of his appointment.—*Ploesman et al. v. Henderson, Adm'r*, 559.
 7. A judge of probate may appoint his son to be an administrator.—It is a manifest violation of judicial delicacy and propriety for a probate judge to appoint his son or relative to be administrator of an estate, but such an appointment is not void.—*Ib.* 559.
 8. An application to a court of probate for an order to sell land is a proceeding *in rem*.—An application to a court of probate for an order to sell land of a decedent for the payment of debts, when collaterally assailed, is regarded as a proceeding *in rem*, and jurisdiction of the thing, not of persons, is the controlling element of its validity. But when the regularity of the proceeding is presented on error, or by appeal, it is regarded as *in personam*.—*Garrett et al. v. Brauer, Adm'r*, 513.
 9. The necessity of the sale must be proven by the personal representative. The burden of proof of the necessity for the sale of land rests on the personal representative, whether there is a contest of the application or not; and this fact he must show by depositions. But the contestant may, by oral evidence, controvert the facts stated in the application. *Ib.* 513.
 10. A tombstone suitable to the value of decedent's estate is a proper charge. A marble slab placed over the intestate's grave, if its cost be in accordance with the value of his estate, and with what was his condition in life, is a proper charge against the assets in the hands of the administrator.—*Hatchett v. Curbow et al., Ex'rs*, 516.
 11. If the estate be declared insolvent, the claim must be verified and filed. But when the estate is legally declared insolvent, the account must be verified and filed against the estate in the same manner as other claims are filed. Under the general policy of our system of insolvency, preferred claims, as well as those not preferred, must be alike verified and filed.—*Ib.* 516.
 12. A delinquent administrator should be compelled by the court to settle his accounts.—When it appears from the records that an executor or administrator is delinquent, it is the duty of the Court of Probate to compel a settlement of his accounts.—*Vinecent, Adm'r v. Daniel et al.* 602.
 13. A party complaining should show an interest in the estate.—If the court proceeds on the application of a party complaining, it should dis-

EXECUTORS AND ADMINISTRATORS—*Continued.*

- tinently appear that he has an interest and cause of complaint, and is not a mere intermeddler in the affairs of other people.—*Ib.* 602.
14. *An administrator failing to appear after citation, is in contempt.*—An executor or administrator who, being cited to make a settlement of his accounts, fails to appear, stands in contempt; and the court may proceed against him by attachment, or may state an account against him. But such an executor or administrator has the right to a vacation of the proceedings by paying the costs of them, and filing his accounts and vouchers for a settlement.—*Ib.* 602.
 15. *The personal representative of the decedent must sue.*—The damages given must be recovered by the personal representative of the decedent; and when the person killed was a married woman, the law does not require the suit to be brought by the husband.—*South & North Ala. R. R. Co. v. Sullivan, Adm'r*, 272.
 16. *A release given by the husband is no defence to a suit brought by the personal representative.*—A release given by the husband to a corporation by whose wrongful act or omission the wife was killed, is no bar, or defence to an action brought by her representative to recover damages.—*Ib.* 272.
 17. *A court of equity will dispense with an administration, when its only object is to make distribution.*—Courts of equity will dispense with an administration, and decree a distribution of the assets, when it is affirmatively shown that the only office of an administration, if granted, would be to make such distribution.—*Jones, Adm'r v. Breward et al.* 499.

EXEMPTIONS.

1. *Only actual occupation can impress on land the character of a homestead.*—Under the constitution, lands are not exempt from liability for payment of debts, unless they have been impressed with the character and quality of a homestead, by actual occupation as a dwelling-place. When this character has been stamped on the land, a temporary absence, with the intention of returning and occupying the premises as a home, will not forfeit the right of exemption.—*Boyle v. Shulman, Goetter & Weil*, 566.
2. *Land leased for more than twelve months loses its character as a homestead.*—If a declaration and claim of exemption has been duly recorded in the office of the judge of probate, a temporary removal from the premises, or a lease for a term of not more than twelve months, will not operate as an abandonment of the place as a homestead; if, however, there is a lease for a longer term, and the acquirement of a homestead elsewhere, the right to exempt it from levy and sale is forfeited.—*Boyle v. LeGrand & Co.* 566.
3. *A mortgage of the homestead prior to April 23, 1873, is a valid conveyance.*—A mortgage of the homestead, executed by the husband and wife prior to the act approved April 23d, 1873, and acknowledged by both according to the requirements of the statute, is a valid conveyance of the homestead.—*Preiss v. Campbell*, 635.
4. *Actual occupation of the premises as a homestead is essential to the right of exemption.*—Actual occupancy of the premises as a dwelling-place is essential to the right of homestead; and when the right is asserted to exist in particular premises, the fact must be averred and proven, and it must also be shown that the premises are capable of use as a dwelling-place.—*Ib.* 635.
5. *Debts contracted prior to 1868 are not affected by exemptions under the constitution of 1868.*—Under the constitution of 1868 an exemption of a homestead or of personal property can be claimed only against debts contracted after its adoption. Prior debts or liabilities are not affected by these exemptions.—*Ib.* 635.

FEES. See ATTORNEY.*

1. *Statutes allowing fees must be strictly construed.*—The statutes which allow fees to sheriffs and other officers for services rendered in prosecutions by the State for criminal offences, and in executing judgments rendered in such prosecutions, give costs, and must be strictly construed.—*Pollard v. Brewer*, 130.
2. *The State is not liable for the payment of turnkey fees.*—The State is not liable to sheriffs for the payment of turnkey fees.—*Ib.* 130.

FRAUD. See CONVEYANCE.

1. *Insolvency alone will not justify a resort to the remedy by attachment.* Indebtedness alone will not justify a resort to the remedy by attachment, not even when coupled with pecuniary embarrassment, or actual insolvency.—*Durr et al. v. Jackson*, 203.
2. *Actual fraud, or an intent to delay and hinder creditors, must exist.* It is actual fraud, an evil intent to hinder and delay creditors, not a mere refusal or failure to pay debts, which will support the accusation that a debtor is fraudulently withholding his property from the payment of his debts. To protect creditors against fraud, is the object of the law which authorizes the issue of an attachment.—*Ib.* 203.
3. *In questions of fraud, all evidence that throws light on the transaction, is admissible.*—If the question be one of fraud, whatever fact tends to show the good or bad faith of a party throughout the whole transaction, is properly admissible in evidence. But illegal testimony, whether given by a witness in open court, or in a deposition, may be objected to, and should be excluded at any stage of the proceedings.—*Ib.* 203.
4. *A judgment for an honest debt obtained for a fraudulent purpose, is void.*—A judgment may be obtained on an honest debt, and yet recovered and used for a fraudulent purpose. If it should be so obtained and used, it would be void as to all persons whose rights are prejudiced, and who are in a position to assail it.—*Hubbard et al. v. Allen*, 283.
5. *A voluntary conveyance of a debtor is void against existing creditors.* In this State, a voluntary conveyance by a debtor, having property more than sufficient to pay all debts or demands against him, is by presumption of law void as to existing creditors, although no fraudulent intent can be imputed either to the donor or the donee.—*Bibb, Adm'r v. Freeman et al.* 612.
6. *A person having a contingent claim is a creditor within the meaning of the statute of frauds.*—A creditor, within the statute of frauds (Code of 1876, § 2124), as to whom a voluntary conveyance is void, is not necessarily one, who has a demand for money which is due, or running to maturity, or who has an existing cause of action. Whoever has a claim or demand on a contract in existence at the time a voluntary conveyance is made, is a creditor within the meaning of the statute. A contingent liability is as fully protected as a claim that is certain and absolute.—*Ib.* 612.
7. *A conveyance beneficial to the donor or injurious to the donee is not voluntary.*—A voluntary conveyance is founded exclusively on motives of generosity and affection. If the donor receives a benefit, or the donee suffers detriment as the consideration of the conveyance, the consideration is valuable. However trivial the benefit to the one, or the damage to the other may be, the conveyance is not voluntary.—*Ib.* 612.
8. *A deed of trust to indemnify sureties on a bond is not invalid as to existing creditors.*—A deed of trust on lands and personal property executed by a guardian of minors to save harmless, sureties on his bond, and reserving to the grantor the right of possession of the property until the children arrive at their majority, is not invalid on its face as to existing creditors.—*Coker v. Shropshire et al.* 542.

GIFT.

1. *A parol gift of land is void.*—A parol gift of land made by a parent to his child is void, and confers no right that can be enforced either at law or in equity. If, subsequently, a deed be executed in consummation of the gift, it is voluntary: it takes effect from the time of its execution, and can not prejudice the rights of existing creditors. *Hubbard v. Allen*, 283.

GUARDIAN.

1. *A covenant not to sue releases the debtor.*—A covenant by a creditor not to sue his debtor operates as a release.—*Flinn v. Carter*, 364.
2. *An error in the description of the decree does not invalidate the bond of indemnity.*—A bond of indemnity which recited that a decree had been rendered against a guardian and his sureties, when it had been rendered only against the guardian, is not void on this account. The error is immaterial.—*Ib.* 364.
3. *When a debtor becomes a trustee entitled to collect a debt, the presumption of its payment is conclusive.*—When a person is a debtor, and as administrator or other trustee becomes the creditor entitled to receive payment of the debt, it will be conclusively presumed that he has paid himself. But when such a person is merely a surety, the presumption does not arise until the time of settlement.—*Ib.* 364.
4. *The nature of legal presumptions.*—Legal presumptions are, like legal fictions, to be adopted only to promote justice, not to defeat it, and the lawful acts and intentions of parties. And a surety upon a guardian's bond, who succeeds his principal as guardian, will not be presumed to have paid himself the amount of the decree against his predecessor, the moment he enters upon the duties of his office.—*Ib.* 364.
5. *As a rule the acts of an infant will not operate as an estoppel en pias.* The guardians of infants can not estop them from asserting title to their land sold without authority of law, by an unauthorized receipt of the purchase-money; nor can infants, as a general rule, do any act which will amount to an *estoppel en pias*.—*Gillespie et al. v. Nabors et al.* 441.

HABEAS CORPUS.

1. *The sentence of a court must be strictly obeyed by the officer charged with its execution.*—A prisoner convicted and sentenced by a court of competent jurisdiction to perform hard labor for the county during a specified term, can not be punished by a confinement in jail for such a period.—*Ex parte Pearson*, 654.

HOMESTEAD.

1. *Only actual occupation can impress on land the character of a homestead.* Under the constitution, lands are not exempt from liability for payment of debts, unless they have been impressed with the character and quality of a *homestead*, by actual occupation as a dwelling-place. When this character has been stamped on the land, a temporary absence, with the intention of returning and occupying the premises as a home, will not forfeit the right of exemption.—*Boyle v. LeGrand & Co.* 566.
2. *Land leased for more than twelve months loses its character as a homestead.*—If a declaration and claim of exemption has been duly recorded in the office of the judge of probate, a temporary removal from the premises, or a lease for a term of not more than twelve months, will not operate as an abandonment of the place as a homestead; if, however, there is a lease for a longer term, and the acquirement of a homestead elsewhere, the right to exempt it from levy and sale is forfeited. *Ib.* 566.

HOMESTEAD—*Continued.*

3. *A mortgage of the homestead prior to April 23, 1873, is a valid conveyance.*—A mortgage of the homestead, executed by the husband and wife prior to the act approved April 23d, 1872, and acknowledged by both according to the requirements of the statute, is a valid conveyance of the homestead.—*Priess v. Campbell*, 635.
4. *Actual occupation of the premises as a homestead is essential to the right of exemption.*—Actual occupancy of the premises as a dwelling-place is essential to the right of homestead; and when the right is asserted to exist in particular premises, the fact must be averred and proven, and it must also be shown that the premises are capable of use as a dwelling-place.—*Ib.* 635.
5. *Debts contracted prior to 1868 are not affected by exemptions under the constitution of 1868.*—Under the constitution of 1868 an exemption of a homestead or of personal property can be claimed only against debts contracted after its adoption. Prior debts or liabilities are not affected by these exemptions.—*Ib.* 635.

INDICTMENT. See CRIMINAL LAW.

INFANCY.

1. *An unborn child is not an heir within the meaning of the statute authorizing a sale of land for partition.*—A child *en ventre sa mere* is not an heir within the meaning of the statute authorizing a sale of the land of an estate for partition among the heirs.—A petition, which shows that one heir is alive, and its mother pregnant by the ancestor from whom the inheritance is derived, gives the court no jurisdiction to order a sale for division among the heirs; and the sale will be void, although the child may be afterwards born alive.—*Gillespie et al. v. Nabors et al.* 441.
2. *An unborn child exists for certain purposes beneficial to it.*—An unborn child is considered as having an existence for certain purposes beneficial to it, but the existence is conditional and imperfect, and confers no right of property until it is born alive.—*Ib.* 441.
3. *As a rule the acts of infants will not operate as an estoppel en pais.* The guardian of infants can not estop them from asserting title to their land, sold without authority of law, by an unauthorized receipt of the purchase-money; nor, as a general rule, can infants do any act which will amount to an estoppel *en pais*.—*Gillespie et al. v. Nabors et al.* 441.

INJUNCTION. See CHANCERY.

INSOLVENT ESTATES.

1. *A tombstone suitable to the value of decedent's estate is a proper charge.* A marble slab placed over the intestate's grave, if its cost be in accordance with the value of his estate, and with what was his condition in life, is a proper charge against the assets in the hands of the administrator.—*Hatchett v. Carbow et al. Ex'rs*, 516.
2. *If the estate be declared insolvent, the claim must be verified and filed.* But when the estate is legally declared insolvent, the account must be verified and filed against the estate in the same manner as other claims are.—*Ib.* 516.

JUDGE.

1. *An objection to a judge on account of interest, must be made at the trial.* An objection to a judge sitting in a case on account of interest, must be made at the time of the trial. It will not be allowed on a motion to quash the execution and vacate the judgment, made several years after it was rendered.—*Collins et al. v. Hammock*, 448.

JUDGE—Continued.

2. *The judge must pay strict attention to the evidence.*—It is the duty of a judge, both in civil and criminal cases, to give strict attention to the evidence; and to propound to the witnesses such questions as he may deem necessary to elicit any relevant and material evidence, without regard to its effect upon the interests of either party. The development and establishment of the truth is his purpose and duty.—*Sparks v. The State*, 82.
3. *The questions of a judge or juror should arise out of the evidence.* The questions a judge, or juror, propounds to witnesses should be such as are suggested by the evidence given on trial.—*Ib.* 82.
4. *The judge should not converse with witnesses privately.*—It is not within the province of a judge to converse privately, either in or out of court, with a witness, to ascertain whether he has knowledge of particular facts; or to suggest to the witness, after his examination, that there are facts, other than those to which he has testified, within his knowledge.—*Ib.* 82.

JUDICIAL KNOWLEDGE.

1. *The court judicially knows who are the sheriffs of the different counties.* It is not necessary that the returns on the notices should state the county of which the officer executing them was sheriff. The courts are bound to know who are the sheriffs of the different counties. But a return that bears no date is defective.—*Timberlake et al. v. Brewer*, 108.

JUDGMENT.

1. *Record of judgment; how may be contradicted.*—The record of a judgment rendered in a sister State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such do not exist, the record will be a nullity notwithstanding it may recite that they did.—*Kingsbury v. Yniestra, Adm'r*, 320.
2. *Judgments create no liens.*—Judgments create no liens upon the property of defendants. A lien is created only by the delivery of an execution to the sheriff, and extends only to the property subject to levy and sale, which is found in the county.—*Woodward v. Parsons*, 625.

JURISDICTION.

1. *A bill must show a case within the jurisdiction of a court of equity.*—A bill must necessarily disclose a case falling within the jurisdiction of a court of equity, and an error in this respect is fatal at any stage of the proceedings.—*Abraham et al. v. Hall et al.* 386.
2. *A bill need not show the amount in controversy is within the jurisdiction of the court.*—A bill is not demurrable because it fails to show affirmatively that the amount in controversy is within the jurisdiction; if it is not, the objection must be raised by plea or answer on the hearing.—*Ib.* 386.
3. *A court of probate has large powers over the assets of estates.*—The court of probate is invested with a large jurisdiction over the marshaling of the assets of deceased persons, compelling distribution and the payment of legacies. There may be instances in which it is necessary to invoke the larger powers of a court of equity to settle litigation, but such is not the case presented by this bill of complaint.—*Whorton v. Moragne et al.* 641.
4. *To correct an improper assessment, the courts must not be sought in the first instance.*—If an erroneous, excessive or unauthorized assessment has been made, the remedy under existing laws does not lie in a resort to the courts in the first instance.—*Lehman, Durr & Co. v. Robinson*, 219.

JURISDICTION—Continued.

5. *The complaint of erroneous assessment should be made at the August term of the Commissioners Court.*—When a complaint is made of a regular assessment, it must be brought before the Court of County Commissioners (or courts exercising its powers), at the August term. And if the assessment has been made at an irregular time, complaint should be made to the first term afterwards.—*Ib.* 219.
6. *Irregularities in judicial proceedings will not authorize the interference of courts of equity.*—Irregularities in judicial proceedings, or the errors of courts of competent jurisdiction, can not create an equity which will justify the interference of a court of equity.—*Bowden v. Perdue*, 409.
7. *The Federal courts can not be interfered with by those of the State.*—It is an established principle that when matters within the concurrent jurisdiction of both the State and Federal courts have been subjected to the control of one of them, there can not be an unnecessary interference therewith by the other.—*City of Opelika v. Daniel*, 211.

JURY. See CRIMINAL LAW.

1. *Whether or not a store is kept open for the purpose of traffic is a question for the jury.*—The purpose for which a store is kept open on Sunday is necessarily a question of fact to be found by the jury, under proper instructions. The transaction should be carefully scrutinized, and if on all the evidence, the jury are convinced, to a moral certainty, that there was in fact a sale, and that it was so intended at the time, then they should not hesitate to render a verdict of guilty.—*Snider v. The State*, 64.
2. *In a conflict between purchasers the jury must ascertain to whom delivery was made.*—When there is a conflict between two purchasers as to whom the delivery of the property was first made, the jury must ascertain the fact according to the evidence; and the court can not assume, as a matter of law, that there had been a sale or delivery to either.—*Robinson v. Hirschfelder*, 503.
3. *The fact of gaming must be ascertained by the jury.*—When it is proven that the defendant and his companions, holding cards in their hands, were sitting on the ground at a place where they had frequently played cards, it is for the jury to determine from the facts whether or not the defendant was playing.—*Henderson v. The State*, 89.

KEEPING STORE OPEN ON SUNDAY. See CRIMINAL LAW.

LANDLORD AND TENANT.

1. *On the death of a tenant a court of equity will enforce the lien of the landlord.*—When the death of a tenant renders it impossible to pursue the statutory remedy by attachment, a court of equity will enforce the lien of the landlord.—*Abraham et al. v. Hall*, 386.
2. *The personal representative must be a party to a bill filed to charge personal assets.*—A bill to charge personal assets can not be maintained unless the personal representative of the decedent, in whom the legal title resides, is before the court.—*Ib.* 386.
3. *The law implies a covenant for the quiet possession of a lease.*—Although a lease does not contain an express covenant for the quiet possession and enjoyment of the premises during the term, the law implies it, and it is the condition on which rent is payable; but this implied covenant extends only to the acts of the lessor, or of those claiming under him.—*Abrams v. Watson et al.* 524.
4. *A landlord is not responsible for the unauthorized intrusion of his other tenants.*—In the absence of an express covenant, a landlord is not liable to one of his tenants for trespasses or unauthorized intru-

LANDLORD AND TENANT—*Continued.*

- sions, on that portion of the premises rented to him by other of the tenants in the same building.—*Ib.* 524.
5. *The removal of a fence by the landlord is a disturbance of the tenant's rights.*—The removal by the lessor, without the lessee's consent, of the fences enclosing the leased premises, is a material disturbance of the rights of the tenant, and entitle him to recover for the damage sustained thereby.—*Ib.* 524.
 6. *A lessee sued for rent, may recoup damages caused by lessor.*—It is now well settled that a lessee, sued for rent, may set up the breach of the lessor's covenants, from which he has sustained damage, by way of recoupment, to extinguish, or reduce the demand; this right, however, is purely legal, and in the absence of special equitable grounds, can not be asserted in equity.—*Ib.* 524.
 7. *The alienees of the lessor occupy his position.*—Alienees of the lessor succeed to rights accruing subsequent to the alienation, subject to existing rights and equities of the lessee.—*Ib.* 524.
 8. *In a suit for rent, the lessee must recoup the damages.*—If the lessee fails to recoup such damages, and suffers judgment to go against him in an action for the rent, he can not resort to equity.—*Ib.* 524.
 9. *Damages caused by imperfect cultivation will not support an attachment for rent.*—Damages caused by the imperfect cultivation of rented land, can not be ascertained by calculation, or be the subject of an affidavit. Consequently they will not support an attachment for rent, or justify a landlord's possession of the crop, against an older mortgagee whose mortgage has been duly recorded.—*Wilkinson v. Ketter*, 306.

LICENSE. See CRIMINAL LAW.

LIENS.

1. *To create a lien for advances, the statute must be complied with.*—To constitute a valid crop lien for advances, not only the form but the spirit of the statute must be complied with in every essential particular.—*Griel v. Lehman, Darr & Co.* 419.
2. *It is unnecessary to specify the land on which the crops will be produced.* The law directs that the instrument creating the lien shall be recorded in the county in which the makers of it reside; but it does not require that the land on which the crops are to be raised shall be specified.—*Ib.* 419.
3. *An attorney has a lien on a judgment in favor of the client for his fee.* An attorney-at-law or a solicitor in chancery has a lien upon a judgment or decree obtained for a client to the extent of the compensation agreed on; or if there be no agreement, to the extent to which he is entitled to recover, reasonable compensation of the client for the services rendered.—*Ex parte Lehman, Darr & Co.* 631.
4. *The lien of an attorney is an assignment of the judgment to the extent of his fee.*—The lien of an attorney or a solicitor rests on the theory that he is to be regarded as an assignee of the judgment or decree, to the extent of his fee, from the date of the rendition of the judgment, or decree, and is subject to all set-offs existing against it at the time.—*Ib.* 631.

LIMITATIONS, STATUTE OF.

1. *After the lapse of twenty years, it will be presumed no debts existed against an intestate.*—After the lapse of twenty years, it will be presumed, in the absence of proof to the contrary, that no debts existed against an intestate upon whose estate no administration had been granted.—*Jones, Adm'r, v. Brevard et al.* 499.
2. *After the lapse of twenty years, a presumption of payment will arise.*

LIMITATIONS, STATUTES OF—*Continued.*

If parties allow twenty years to elapse without taking any steps to compel the settlement of a mortgage debt, or to assert rights of property, the presumption of payment or settlement of the disputed title arises.—*Goodwyn et al. v. Baldwin et al.* 127.

MANDAMUS.

1. *A writ of mandamus will not be granted if another remedy exists.*—A writ of *mandamus* will be granted only when the petitioner has a clear legal right, and has no other specific and adequate remedy to enforce it.—*Murphy v. ex rel. Egger*, 639.
2. *Mandamus will not answer a plea to a pending suit.*—*Mandamus* can not be made to answer the office of a plea to a pending suit, nor of an action at law to recover specific property, or for abuse of process. *Ib.* 639.
2. *An election will not be compelled, except when the suits seek the same relief.*—To require an election between a suit at common law and a suit in chancery, the suits must not only have the same aim and scope, but they must relate to the same subject-matter, and seek substantially the same relief.—*Ex parte Ala. Gold Life Ins. Co.* 192.
3. *An application for a writ of mandamus must state specifically what is required.*—*Mandamus* commands the performance of specific acts; and if not performed as ordered, the court treats the refusal as a contempt and punishes the disobedience as such—consequently, the party commanded must be informed what he is required to do in terms so specific that he can know the precise duty exacted of him.—*Harrell v. Mob. & Mont. Railw. Co.* 321.
5. *The averment in such an application must be certain.*—An averment in a petition for a *mandamus* that the relator tendered “bales of lint cotton,” without specifying the number of bales, is indefinite and fatally defective. The number of bales should have been so stated that the court could have ordered the railway company to do a specific thing. *Ib.* 321.
6. *When another remedy exists, a mandamus will not be granted.*—Section 1698, of the Code of 1876, affords ample, if not generous redress, to every one who suffers from excessive charges by a railroad company, and consequently, under the authorities, the *mandamus* in this case must be denied.—*Ib.* 321.

MARRIAGE. See CRIMINAL LAW.

MARRIED WOMAN, SEPARATE ESTATE OF.

1. *The statutory separate estate of a married woman is purely legal.*—The statutory separate estate of a married woman is not an equitable, but a purely legal estate, and can be charged only to the extent and in the manner prescribed by the law creating it.—*O'Connor v. Chamberlain*, 431.
2. *It can be charged only for articles of support for which the husband is liable.*—The liability of the husband for articles of comfort and support is an indispensable element of the right to charge the wife's statutory estate with the payment of them; and no order subjecting it to sale can be made unless it is based on a judgment in a suit against both of them, or is preceded by a judgment against the husband alone.—*Ib.* 431.
3. *If credit for necessities be given solely to the wife, her statutory estate is not liable.*—The agency or consent of the husband is not material in fixing his liability to pay for necessities furnished his wife; but if the credit be given solely to the wife, in exclusion of all liability of the husband, no recovery can be had against him; and an indispensable element of a charge against the statutory estate of the wife is wanting. *Ib.* 431.

MARRIED WOMAN, SEPARATE ESTATE OF—*Continued.*

4. *The record of a judgment against the husband is not evidence of the nature of the articles purchased.*—In a proceeding under the statute to subject the wife's statutory estate, after judgment against the husband, the record of such a recovery is not evidence that the items, composing the account, were articles of comfort and support of the household. *Cheatham v. Newman*, 547.
5. *No change in the statutory separate estate can defeat proceedings against it.*—No change in the statutory separate estate existing and liable for the account when it was made, can defeat proceedings instituted to subject the estate to its payment.—*Ib.* 547.

MISNOMER. See CRIMINAL LAW, Title *Abatement*.

MONEY.

1. *Bank-notes included under the name of money.*—Since the introduction and free use of bank-notes and treasury-notes as a circulating medium and standard of value, they are understood to be embraced in the generic term money, as much as the authorized coin of the country. *Noble v. The State*, 73.
2. *An agreement may be void for uncertainty.*—An agreement for the advancement of money which contains no specified sum, or any facts from which the sum may be ascertained, is void for uncertainty.—*Gafford v. Proskauer & Co.* 264.

MORTGAGE.

1. *After the lapse of twenty years, a presumption of payment will arise.* If parties allow twenty years to elapse without taking any steps to compel the settlement of a mortgage debt, or to assert rights of property, the presumption of payment or settlement of the disputed title arises.—*Goodwyn v. Baldwin*, 127.
2. *If a purchaser has constructive notice of the mortgage, he is also informed by its date, of the presumption of the law.*—If the purchasers of land are constructively notified by the registration of a mortgage more than twenty years old, of the lien and incumbrance it created, they are also informed by its date and age that the law presumed the payment of the debt it was given to secure.—*Ib.* 127.
3. *The holder of a note secured by mortgage is regarded as a bona fide purchaser.*—A creditor who permits a debtor to substitute for his note upon which is a solvent surety, a note made by the debtor alone, secured by mortgage, must be regarded as a *bona fide* purchaser, when the note is assailed as usurious by one, who is neither the personal representative of the debtor nor his surety.—*Wilson v. Knight et al.* 172.
4. *A mortgagee of land does not lose his lien by taking a mortgage executed by husband and wife.*—The mortgagee of land who holds it under such circumstances as will make him a *bona fide* purchaser against the mortgagor's wife, attempting to subject the land to the payment of money belonging to her statutory separate estate, invested in it, does not lose the benefit of such mortgage by taking a second mortgage executed by the husband and wife to secure the payment of their note, extending the time for the payment of the debt. *Ib.* 172.
5. *A set-off, available at law, may be used in equity against a mortgagee.* When the mortgagee seeks a foreclosure in equity, the mortgagor may set-off any debt or demand against the mortgagee, which would be the proper subject of set-off, if the mortgagee were suing at law for the mortgage debt.—*Gafford v. Proskauer & Co.* 264.
6. *Damages sustained by disobedience of instructions in the sale of cotton are recoverable.*—Damages which the mortgagor has sustained by the

MORTGAGE—*Continued.*

- mortgagee's violation of instructions to postpone the sale of his cotton, are under our statute a proper subject of set-off: and the measure of damages is the difference between the sum realized on the unauthorized sale, and the sum which would have been realized if the instructions had been obeyed.—*Ib.* 264.
7. *The mere right of set-off will not authorize a resort to equity.*—A mortgagor can not resort to equity for relief against the mortgagee, or mortgage debt, merely on the ground that he has a demand against the mortgagee which may be a proper subject of set-off.—*Ib.* 264.
 8. *The mortgagee is a trustee for the mortgagor.*—A mortgagee although clothed with the legal title is in a large sense a trustee for the mortgagor. To protect his rights he can remove prior incumbrances, but neither the mortgagor, nor any one else, can redeem without compensating the mortgagee.—*Grigg, Adm'x v. Banks*, 311.
 9. *A creditor claiming the right to redeem must pay all lawful charges.* A creditor claiming the right to redeem from him, must not only pay the sum bid at the sheriff's sale, with ten per cent. per annum thereon, but must also pay the mortgagee's debts, which are in the words of the statute, "lawful charges."—*Ib.* 311.
 10. *Such a lien is not lost, by the character of the instrument that evidences the debt.*—Such a lien is not impaired or destroyed by the fact that the same instrument contains a mortgage on the same property to secure the same debt.—*Grady et al. v. Hall*, 341.
 11. *The mortgagee is a necessary party to a bill filed by the transferee of a mortgage debt.*—A bill filed by the transferee of a mortgage debt to whom the mortgage has not been assigned, to foreclose the mortgage, must make the mortgagee a party to the suit.—*Bibb v. Hawley*, 403.
 12. *The mortgagee is chargeable with rents from the time of entry into possession.*—When a mortgagor files a bill to redeem the premises in the possession of the mortgagee, the latter is chargeable with the actual rents and profits received by him from the time he entered into possession, and credited with the annual taxes on the property he may have paid; the balance remaining each year should be applied, first, to the extinguishment of the interest on the mortgage debt, and the remainder, if any, to the principal.—*Blum & Co. v. Mitchell*, 535.
 13. *The mortgagor seeking to redeem must pay costs.*—The general rule is, that a mortgagor coming in to redeem must pay costs.—*Ib.* 535.
 14. *In the absence of a stipulation, the mortgagee is entitled to the possession of the property.*—A mortgage in the absence of express stipulations, or necessary implications, gives the right to immediate possession of the property, and the mortgagee may at any time take possession of it, or recover it by suit.—*Woodward v. Parsons*, 625.
 15. *No presumption will be indulged that the mortgagee is not entitled to immediate possession.*—No presumption can be indulged that the right to immediate possession was withheld, when the debt, for the security of which mortgage was given, was due at the time of its execution.—*Ib.* 625.
 16. *A mortgagor can not enjoin the sale of land not embraced in the mortgage.*—A mortgagor can not maintain a bill to restrain the sale under a mortgage, of land not conveyed by it. The purchaser at the sale could only take the land mortgaged. Such a sale can not cast a cloud on the title of land not included in the mortgage.—*Preiss v. Campbell*, 635.

OFFICERS.

1. *Those who accept public offices, must take them cum onere.*—Those who accept public offices which require them to render services to the State, must take the office *cum onere*. The rendition of such service is gratuitous, unless by express statutory provision compensation is

OFFICERS—*Continued.*

fixed, and an express liability for its payment imposed on the State.
Pollard v. Brewer, 130.

PARTITION OF LAND.

1. *In a proceeding for partition of land all persons interested should be made parties.*—If in a proceeding instituted in a court of probate for the partition of land, it should appear that all the persons interested in the property are not made parties before the court, it can properly revoke and annul the order for partition.—*Whitman et al. v. Reese et al.* 532.
2. *Such a proceeding is summary, and, an error will not take away jurisdiction which has attached.*—Such a proceeding is statutory and somewhat summary in its administration. It is instituted by petition, and when it contains all necessary averments of fact to give the court jurisdiction, any error committed afterwards does not affect the jurisdiction.—*Ib.* 532.
3. *The Probate Court has no jurisdiction of such a matter when an infant is interested.*—But if it shows that the land can not be equitably partitioned under the limited powers of a court of probate, then its jurisdiction never attaches; and if there be infants, or persons not made parties, whose interests are affected, the proceeding is *coram non judice*, and void.—*Ib.* 532.
4. *A champertous contract is void.*—A contract in which it is agreed that attorneys-at-law shall receive one-half of the land in litigation, for the services they may render in the suit, if it should be conducted to a successful termination as champertous; and being against public policy is void.—*Jenkins et al. v. Bradford*, 400.

PARTNERSHIP.

1. *A partner can sell all the stock in trade in a single transaction.*—A member of a partnership has control of its property, and can sell the whole stock in trade by a single contract.—*Hyrschfelder v. Keyser*, 338.
2. *A partner can not transfer partnership property in payment of his individual debts.*—One partner can transfer the property of the firm to its creditors in discharge of its indebtedness; but he has no authority to dispose of it in payment of his individual liabilities, when it is needed for the satisfaction of partnership debts.—*Ib.* 338.
3. *The entries in the books of a partnership are presumed to be correct.* The books of a commercial partnership, and the entries therein, when all the members have free access to them, are evidence for and against the several partners in settling the partnership accounts. The entries are presumed to be correct until the contrary is shown.—*Routen et al. v. Bostwick et al.* 360.
4. *One partner is not liable for the acts of another beyond the scope of the partnership.*—The mere fact of partnership does not make one partner liable for the other with reference to matters, not shown to be within the scope of partnership.—*Abraham et al. v. Hall*, 386.
5. *The interest of a partner may be sold to pay his individual indebtedness.* It is well established in this State that the separate creditor of one partner may take in execution that partner's interest in the tangible property of the partnership; but the purchaser at the sheriff's sale can not take into his exclusive possession the property which still remains subject to the debts of the partnership.—*Wilson v. Strobach*, 488.
6. *The levy upon a partner's interest in an insolvent partnership may be released.*—A sheriff who has levied on the interest of one partner on the suit of his separate or individual creditor may release the levy, when the partnership is insolvent; and the sale of the partner's interest would have been unproductive of anything to satisfy the execution.—*Ib.* 488.

PARTNERSHIP—*Continued.*

7. *On a motion against the sheriff he may prove the insolvency of the partnership.*—On a motion against the sheriff for his failure to collect the money due on the judgment, it is competent for him to prove the insolvency of the partnership.—*Ib.* 488.
8. *A union of land and stock with personal skill, and labor, and stock, and equality of expenses and profits, make a partnership.*—Parties who enter into an agreement by which one is bound to contribute land and stock for its cultivation, and the other to contribute personal skill and labor and other stock; each to furnish a specified proportion of the food for the animals; to pay equally the expenses of the plantation and to divide equally the crops, are partners, and not tenants in common.—*Autrey v. Frieze*, 587.
9. *Such an agreement may be afterwards modified.*—Persons entering into such an agreement may afterwards modify or rescind it; but a rescission or modification of it can not be proven by loose declarations or conversations, especially when their subsequent conduct accords with the original contract.—*Ib.* 587.
10. *Bankruptcy will cause a dissolution of the partnership.*—A partnership will be dissolved by the bankruptcy of one of its members; and the assignee of the bankrupt becomes a joint owner with the solvent partners, of the property of the partnership.—*McNutt et al. v. King et al.* 597.
11. *The transfer of a right of action by the assignee, does not authorize the transferee to sue in his own name.*—The transfer by such an assignee of a mere right of action for the conversion of personal property does not invest the transferee with a legal title; the only effect of the transfer would be to authorize the transferee to sue in the name of the assignee, jointly with the solvent partners, and to receive the bankrupt's share of the amount recovered.—*Ib.* 597.

PAYMENT.

1. *A debtor may direct the application of a payment.*—A debtor before, or at the time, of payment, may direct its application; if he does not, the creditor may apply it as he pleases. If the money paid is derived from a particular source or fund, its payment must be applied to the relief of such fund, unless an agreement be made for its application otherwise.—*Lerystein & Simon v. Whitman et al.* 345.
2. *A creditor can not divert a payment without the consent of the debtor.* It is the application of the payment by the debtor which deprives the creditor of this right, and also hinders the law from appropriating it; but if the creditor proposes to divert the payment from the relief of the fund or source whence the money is derived, he must obtain authority from the debtor for such diversion.—*Ib.* 345.

PETITION FOR REHEARING.

1. *A petition for a rehearing, not containing the requisite allegations, should be refused.*—A petition for a rehearing, which contains no facts that brings it within the influence of sections 3159 and 3160 of the Code of 1876, should not be granted.—*Bingham v. Montgomery*, 334.

POWER.

1. *A power granted by a testator must be executed by all the donees.*—If a testator confers upon several persons jointly a power to do any act, it can not be well exercised if, from any cause, one or more of the donees fails to join in its execution.—*Marks v. Tarver et al.* 335.
2. *A power resting on personal confidence can not be extended beyond its terms.*—A power resting on personal confidence in the donee, can not be extended beyond its express terms and the clear intention of the testator.—*Ib.* 335.

PLACE, PUBLIC. See CRIMINAL LAW, Title *Gaming*.

PLEADING AND PRACTICE.

1. *The notice to a defaulting tax-collector is both process and pleading.*
In summary proceedings against defaulting tax-collectors, it is the settled practice to regard the notice of the motion for judgment as serving the double purpose of process and pleading. But the technical precision and accuracy of a declaration at common law is not required.—*Timberlake et al. v. Brewer*, 108.
2. *Its allegations should be reasonably certain.*—It is sufficient when the liability of the defendant, which is sought to be enforced, is stated with reasonable certainty, and the defendant is fairly apprised of the cause of action, and the court informed of the judgment it is called on to render.—*Ib.* 108.
3. *The court judicially knows who are the sheriffs of the different counties.*
It is not necessary that the returns on the notices should state the county of which the officer executing them was sheriff. The courts are bound to know who are the sheriffs of the different counties. But a return that bears no date is defective.—*Ib.* 108.
4. *Ten days notice of the intended motion must be shown by the return.*
Ten days notice to the party against whom judgment is to be rendered is an essential element of the proceeding. The deficiency can not be supplied by parol-evidence.—*Ib.* 108.
5. *The certificate of the auditor is presumptive evidence of the act or omission upon which motion is based.*—The certificate of the auditor is presumptive evidence of the act or omission upon which the motion is founded, and of the amount due the State. It is not required by law to be based alone on the returns on file in his office; when necessary, and he must judge of the necessity, he may resort to other sources of information, and predicate the certificate on facts derived from them.—*Ib.* 108.
6. *Its admissibility can not be questioned on account of the information on which the auditor acted.*—The admissibility of the certificate can not be questioned, nor its force as evidence lessened, because of the sources of information on which the auditor may have acted. It conforms to the statute if it states the omission of the tax-collector to pay the amount of taxes collected by him into the State treasury, and the amount due the State.—*Ib.* 108.
7. *An election will not be compelled, except when the suits seek the same relief.*—To require an election between a suit at common law and a suit in chancery, the suits must not only have the same aim and scope, but they must relate to the same subject-matter, and seek substantially the same relief.—*Ex parte Ala. Gold Life Ins. Co.* 192.
8. *The consideration of a question by the court may be waived by the parties.*
The appellate court will not consider a question which the record shows has been waived by an agreement of the parties.—*Bibb v. Hawley*, 403.
9. *A mortgagee is a necessary party to a bill filed by the transferee of a mortgage debt.*—A bill filed by the transferee of a mortgage debt to whom the mortgage has not been assigned, to foreclose the mortgage, must make the mortgagee a party to the suit.—*Ib.* 403.
10. *The omission of an indispensable party is available on error.*—The omission of an indispensable party is available on error, although no objection was made on this account in the court of chancery.—*Ib.* 403.
11. *The action of the court on a demurrer to useless pleas will not be considered.*—Where a case according to the proof properly turned on a plea of *non-assumpsit*; and special pleas were unnecessary, and no result could have been brought about by their interposition, the court will not consider the rulings on demurrer.—*Street v. Kelley & Co.* 355.
12. *If the facts show the plaintiff has no right, error will not cause a rever-*

PLEADING AND PRACTICE—*Continued.*

- sal.*—If all the facts in a case show that the plaintiff is not entitled to recover, the appellate tribunal will not reverse the judgment of the Circuit Court, if it should err in its rulings on demurrer, or in receiving evidence.—*Ib.* 355.
13. *A stranger can not be made a party to a suit without the consent of his adversary.*—A person who is neither plaintiff nor defendant, can not be made a party to a suit at law without his adversary's consent, unless the action be for the recovery, or possession, of lands.—*Ex parte Proskauer*, 194.
 14. *Evidence to controvert the debt on which a judgment is founded, is inadmissible.*—Evidence can not be introduced for the purpose of controverting the debt on which a judgment is founded. Such a judgment affirms the existence of the debt, and is conclusive between the parties whenever the fact of indebtedness is again in issue between them, directly or collaterally.—*Durr et al. v. Jackson*, 203.
 15. *Evidence may be admissible for one purpose and inadmissible for another.*—Evidence is often admissible for one purpose, when inadmissible for another and distinct purpose. A party apprehending injury from its admission, can, by requesting proper instructions from the court, confine its operation to its lawful purpose.—*Ib.* 203.
 16. *In a suit for the "vexatious suing out" of an attachment, it is not necessary to prove personal ill-will.*—In an action for the vexatious suing out of an attachment, it is not necessary to prove personal ill-will, or revenge. A party may, without probable cause, resort to an attachment; and absence of probable cause, coupled with the unlawful act of suing out the writ, is the vexatious, malicious abuse of the process against which the statute intends to guard, and for which the jury are authorized to give vindictive damages.—*Ib.* 203.
 17. *A charge correct in law, but which tends to mislead the jury, will not cause a reversal.*—A reversal can not be had because of an instruction correct in point of law, merely on account of its tendency to mislead. The evil is capable of correction by an explanatory charge, which should be requested.—*Ib.* 203.
 18. *The Federal courts can not be interfered with by those of the State.* It is an established principle that when matters within the concurrent jurisdiction of both the State and Federal courts have been subjected to the control of one of them, there can not be an unnecessary interference therewith by the other.—*The City of Opelika v. Daniel et al* 211.
 19. *A suit at law in a Federal court can be enjoined only by the same court.* A defendant, sued at law in a Federal court, who has an equitable defence, or is entitled to the benefit of an injunction, should file his bill on the equity side of the same court. No tribunal of a State can enjoin such a suit.—*Ib.* 211.
 20. *Courts do not judicially know the members of a firm.*—What individuals transact business under a firm name, courts can not judicially know. It is only the persons that compose a partnership of whom they can take cognizance, upon whom their process can be served, and against whom their orders and personal decrees can be enforced. The court has no jurisdiction of unknown persons engaged in business together, under a name which is not the name of an individual or of a body corporate, and can not render a decree against them.—*Ib.* 211.
 21. *Section 2904 of the Code applies only to suits at law.*—Section 2904 of the Code of 1876 does not relate to proceedings in a court of equity.—*Ib.* 211.
 22. *The averment in such an application must be certain.*—An averment in a petition for a *mandamus* that the relator tendered "bales of lint cotton," without specifying the number of bales, is indefinite and fatally defective. The number of bales should have been so stated

PLEADING AND PRACTICE—*Continued.*

- that the court could have ordered the railway to do a specific thing. *Harrell v. Mob. & Mont. Railw. Co.* 321.
- 23. *When another remedy exists, a mandamus will not be granted.*—Section 1698 of the Code of 1876, affords ample, if not generous redress to every one who suffers from excessive charges by a railroad company, and consequently, under the authorities, the *mandamus* in this case must be denied.—*Ib.* 321.
- 24. *A bill is not demurrable because it fails to allege the vendor had a good title.*—A bill to enforce a vendor's lien, which avers that the defendant entered into and retains possession of the land under the contract of purchase, and that he accepted the vendor's bond conditioned to make title upon payment of the purchase-money, and that it is due and unpaid, is not demurrable because it does not allege that the vendor had a good title.—*Teague v. Wade*, 369.
- 25. *A naked bailee is not a necessary party to a bill against the bailor.*—A mere naked bailee who asserts no claim in himself to property deposited with him as warehouseman, should not be made defendant to a bill against the bailor, praying for an equitable attachment.—*Abraham et al. v. Hall et al.* 386.
- 26. *Bankruptcy is a personal defence, and must be pleaded.*—Bankruptcy and discharge under it are a personal defence, and if not pleaded in trying the case, will be considered as waived.—*Collins et al. v. Hammock*, 448.
- 27. *It may be presumed from the recitals of a judgment-entry that the parties were in court.*—Although the transcript contains neither summons, complaint, nor plea, yet if the judgment-entry recites that the parties came by attorneys; that issues joined were submitted to a jury; that they returned a verdict upon which a judgment was pronounced, it must be held that the parties were in court by proper service, or voluntary appearance; that a complaint containing a substantial cause of action was filed, and that issues were joined thereon.—*Keith v. Cliatt & Bro.* 408.
- 28. *An amendment will not be presumed, because leave to amend was granted.* In the absence of anything of record to show that an amendment was made, it can not be presumed that it was made, from the mere fact that leave was given to amend.—*Ib.* 408.
- 29. *When an injunction will be dissolved.*—The general rule of practice is that on the filing of an answer, an injunction may be dissolved on motion, if the equity of the bill is fully and completely denied; and whether the allegations of the bill be denied or not, an injunction may be dissolved, if the bill be wanting in equity.—*Bishop et al. v. Wood*, 253.
- 30. *The right of amendment must be claimed.*—The right of amendment is secured by the statutes, but it is a right which must be claimed by the party entitled to it; and when there is an opportunity of claiming it, the chancellor errs only by a denial of it.—*Ib.* 253.
- 31. *It is error to dismiss a bill in vacation, when the complainant has not had an opportunity to amend the bill.*—When the demurrer to the bill, or a motion to dismiss it for want of equity, has not been heard; and the equity of the bill is drawn in question only incidentally, and the decree is rendered in vacation,—an absolute dismissal of the bill without affording the complainant an opportunity of amendment, is erroneous.—*Ib.* 253.

PRESUMPTIONS.

- 1. *When a debtor becomes a trustee entitled to collect a debt, the presumption of its payment is conclusive.*—When a person is a debtor, and as administrator, or other trustee becomes the creditor entitled to receive payment of the debt, it will be conclusively presumed that he

PRESUMPTIONS—*Continued.*

- has paid himself. But when such a person is merely a surety, the presumption does not arise until the time of settlement.—*Flinn v. Carter*, 364.
2. *The nature of legal presumptions.*—Legal presumptions are, like legal fictions, to be adopted only to promote justice, not to defeat it, and the lawful acts and intentions of parties. And a surety upon a guardian's bond, who succeeds his principal as guardian, will not be presumed to have paid himself the amount of the decree against his predecessor, the moment he enters upon the duties of his office.—*Ib.* 364.
 3. *A presumption in favor of the truth of the writing arises from lapse of time.*—But if a party deliberately, and with a full knowledge of its contents, voluntarily executes an instrument in writing, and acquiesces in its statements for several years, and so acts as to induce the holder thereof to rest in security upon the validity of the contract, a strong presumption arises that the writing speaks the truth, and this can be repelled only by satisfactory evidence.—*Blum & Co. v. Mitchell*, 535.
 4. *After the lapse of twenty years, a presumption of payment will arise.* If parties allow twenty years to elapse without taking any steps to compel the settlement of a mortgage debt, or to assert rights of property, the presumption of payment or settlement of the disputed title arises.—*Goodwyn v. Baldwin*, 127.
 5. *After the lapse of twenty years, it will be presumed no debts existed against an intestate.*—After the lapse of twenty years, it will be presumed, in the absence of proof to the contrary, that no debts existed against an intestate, upon whose estate no administration had been granted.—*Jones, Adm'r v. Brevard et al.* 499.

PROBATE COURT.

1. *The Court of Probate can sell land only for division.*—The Court of Probate has no jurisdiction to sell lands of an estate unless there be heirs or devisees among whom the land can not be equitably divided.—*Gillespie et al. v. Nabors*, 441.
2. *An unborn child is not an heir within the meaning of the statute authorizing a sale of land for partition.*—A child *en ventre sa mère* is not an heir within the meaning of the statute authorizing a sale of the land an estate for partition among the heirs. A petition, which shows that one heir is alive, and its mother pregnant by the ancestor from whom the inheritance is derived, gives the court no jurisdiction to order a sale for division among the heirs; and the sale will be void, although the child may be afterwards born alive.—*Ib.* 441.
3. *An unborn child exists for certain purposes beneficial to it.*—An unborn child is considered as having an existence for certain purposes beneficial to it, but the existence is conditional and imperfect, and confers no right of property until it is born alive.—*Ib.* 441.
4. *A Court of Probate has large powers over the assets of estates.*—The Court of Probate is invested with a large jurisdiction over the marshalling of the assets of deceased persons, compelling distribution and the payment of legacies. There may be instances in which it is necessary to invoke the larger powers of a court of equity to settle litigation, but such is not the case presented by this bill of complaint.—*Whorton v. Moragne et al.* 641.
5. *A Court of Probate can not, of its own motion, convert an annual into a final settlement.*—When proceedings are instituted and conducted for an annual or partial settlement, the Court of Probate can not, of its own motion, convert it into a final settlement, and render a final decree.—*Ib.* 641.
6. *A court of equity, in the absence of peculiar facts, will not arrest proceedings in a Court of Probate.*—A court of equity will not, at the in-

PROBATE COURT—*Continued.*

stance of an administrator or executor, arrest proceedings commenced in a Court of Probate, for a final settlement of an administration, unless some specific fact or circumstance is shown, which renders the limited power of that court inadequate to a full and complete settlement of the trusts of the administration.—*Ib.* 641.

7. *When a bill is dismissed prematurely, nothing but its equity will be considered.*—When a bill is dismissed for want of equity before the cause was in condition to be heard on its merits, the appellate court will decide no other question than the equity of the bill, because no other was submitted to, and passed upon, by the chancellor.—*Ib.* 641.
8. *In a proceeding for partition of land all persons interested should be made parties.*—If in a proceeding instituted in a Court of Probate for the partition of land, it should appear that all the persons interested in the property are not made parties before the court, it can properly revoke and annul the order for partition.—*Whitman et al. v. Reese et al.* 532.
9. *Such a proceeding is summary, and an error will not take away jurisdiction which has attached.*—Such a proceeding is statutory and somewhat summary in its administration. It is instituted by petition, and when it contains all necessary averments of fact to give the court jurisdiction, any error committed afterwards does not affect the jurisdiction.—*Ib.* 532.
10. *The Probate Court has no jurisdiction of such a matter when an infant is interested.*—But if it shows that the land can not be equitably partitioned under the limited powers of a Court of Probate, then its jurisdiction never attaches; and if there be infants, or persons not made parties, whose interests are affected, the proceeding is *coram non judice*, and void.—*Ib.* 532.

PROMISSORY NOTE.

1. *A defendant can not defeat an action upon a note by showing that the plaintiff obtained it from the payee without consideration.*—If pending a suit an arbitration is made, and in pursuance of the award the defendant, at the request of the plaintiff, executes a promissory note to a third person, he can not, when sued on the note, defeat the action by showing no consideration passed between the plaintiff and payee; nor can he raise any question as to the application of the money due on the note to payment of attorney's fees of plaintiff's counsel in the original suit.—*Yeatman v. Mattison*, 382.
2. *Parol evidence of stipulations, inconsistent with the terms of the note, is inadmissible.*—The makers of a promissory note, payable absolutely at a time certain, can not introduce parol evidence of prior or contemporaneous stipulations, that are inconsistent with the terms of the note, to defeat a recovery by the payee.—*Gliddens v. Harrison, et al.* 481.
3. *The promise, for a consideration, to pay the debt of another, is not within the Statute of Frauds.*—A promise of one person to pay the debt of another, made upon a new and valuable consideration beneficial to the promisor, is not within the Statute of Frauds.—*Graves v. Shulman, Goetter & Weil*, 506.
4. *A promissory note is not conclusive presumption that the payee has paid the maker.*—Although the giving of a note is *prima facie* evidence that a previous indebtedness of the payee to the maker is or has been extinguished, yet the contrary may be shown by proof.—*Ib.* 406.
5. *The consideration of a written instrument may be inquired into.*—The consideration of a bond, bill, note or other written evidence of debt, whether it is silent as to, or expresses, the particular consideration, is, in respect to the consideration, open to inquiry, and parol evidence may be received to explain, or to qualify, or to contradict any recital of consideration it may contain.—*Blum & Co. v. Mitchell*, 535.

RECOGNIZANCE. See CRIMINAL LAW.

RECORDS.

1. *The Court of County Commissioners can amend its records.*—The Commissioners Court, like every court of record, has power to amend its records *nunc pro tunc*, if there be matter of record, that authorizes the amendment.—*Commissioners' Court of Lowndes Co. v. Hearne*, 371.
2. *Its record must show jurisdiction.*—The court is of limited statutory authority, and to support its proceedings when assailed on *certiorari*, its records must affirmatively show jurisdiction.—*Ib.* 371.
3. *After its action a right to writ of certiorari is complete.*—After the court orders the change of a road, appoints viewers and accepts their report, the right of a person aggrieved, to a *certiorari* is complete; and the court in its return should certify its records as they existed when the writ was issued, and not a record subsequently made whose validity has not been questioned.—*Ib.* 371.

REDEMPTION OF LAND.

1. *The mortgagee is a trustee for the mortgagor.*—A mortgagee although clothed with the legal title is in a large sense a trustee for the mortgagor. To protect his rights he can remove prior incumbrances, but neither the mortgagor, nor any one else, can redeem without compensating the mortgagee.—*Grigg, Adm'r v. Banks*, 311.
2. *A creditor claiming the right to redeem must pay all lawful charges.* A creditor claiming the right to redeem from him, must not only pay the sum bid at the sheriff's sale, with ten per cent. per annum thereon, but must also pay the mortgagee's debts, which are in the words of the statute, "lawful charges."—*Ib.* 311.

REHEARING AT LAW. See PETITION.

RETAILING. See CRIMINAL LAW.

SALE.

1. *Things not in being can not be sold.*—Things not in being can not be the subject of sale, but they may be of an agreement to sell.—*Robinson v. Hirschfelder*, 506.
2. *A contract to sell is not a sale, if anything remains to be done by the seller.*—A contract is only an agreement to sell, and does not become a sale if any term in which the seller must co-operate, or which imposes a liability or duty on him, remains to be performed.—*Ib.* 503.
3. *In a conflict between purchasers the jury must ascertain to whom delivery was made.*—When there is a conflict between two purchasers as to whom the delivery of the property was first made, the jury must ascertain the fact according to the evidence; and the court can not assume, as a matter of law, that there had been a sale or delivery to either.—*Ib.* 503.
4. *An application to a Court of Probate for an order to sell land, is a proceeding in rem.*—An application to a Court of Probate for an order to sell land of a decedent for the payment of debts, when collaterally assailed, is regarded as a proceeding *in rem*, and jurisdiction of the thing, not of persons, is the controlling element of its validity. But when the regularity of the proceeding is presented on error, or by appeal, it is regarded as *in personam*.—*Garrett et al. v. Bruner, Adm'r*, 513.
5. *The necessity of the sale must be proven by the personal representative.* The burden of proof of the necessity for the sale of land rests on the personal representative, whether there is a contest of the application or not; and this fact he must show by depositions. But the contestant may, by oral evidence, controvert the facts stated in the application.—*Ib.* 513.

SALE—Continued.

6. *The value of land sold during the war must be estimated in lawful money at the time of the sale.*—The value of land sold under the circumstances shown by the record in this case is the value of the property in lawful money at the time of the sale.—*Doughdrill v. Edwards*, 424.
7. *A misrepresentation of a material fact will authorize a rescission of the contract.*—A misrepresentation of a material fact by the vendor, on which the vendee relies, and has the right to rely, although made without a knowledge of its falsity, may constitute a fraud on the purchaser, authorizing a rescission of the contract of sale; or furnish a ground of defence to an action for the price, or support an action on the case for deceit.—*Perry v. Johnston et al.* 648.
8. *If the vendor knows the purpose of the purchaser, and represents the property as fit for it, the representation will be an implied warranty.* On a sale of property which is present and open to examination by the purchaser, there is no implied warranty of its fitness for any particular use. But if the vendor is informed that the vendee is buying the property for a particular use, a representation by the seller of its fitness, is an implied, if not an express, warranty.—*Ib.* 648.

SELF-DEFENCE. See CRIMINAL LAW.

SEPARATE ESTATE OF A MARRIED WOMAN.

1. *The statutory separate estate of a married woman is purely legal.*—The statutory separate estate of a married woman is not an equitable, but a purely legal estate, and can be charged only to the extent and in the manner prescribed by the law creating it.—*O'Connor v. Chamberlain*, 431.
2. *It can be charged only for articles of support for which the husband is liable.*—The liability of the husband for articles of comfort and support is an indispensable element of the right to charge the wife's statutory estate with the payment of them; and no order subjecting it to sale can be made unless it is based on a judgment in a suit against both of them, or is preceded by a judgment against the husband alone.—*Ib.* 431.
3. *If credit for necessities be given solely to the wife, her statutory estate is not liable.*—The agency or consent of the husband is not material in fixing his liability to pay for necessities furnished his wife; but if the credit be given solely to the wife, in exclusion of all liability of the husband, no recovery can be had against him; and an indispensable element of a charge against the statutory estate of the wife is wanting.—*Ib.* 431.
4. *A court of equity can not impose on it burdens not imposed by the statute.*—The liability of the statutory estate of a married woman is fixed by law, and a court of equity is as powerless as a court of law to dispense with the requirements of the statute, or to subject it to burdens beyond what the statute imposes.—*Ib.* 431.
5. *The record of a judgment against the husband is not evidence of the nature of the articles purchased.*—In a proceeding under the statute to subject the wife's statutory estate, after judgment against the husband, the record of such a recovery is not evidence that the items, composing the account, were articles of comfort and support of the household.—*Cheatham v. Newman*, 547.
6. *No change in the statutory separate estate can defeat proceedings against it.*—No change in the statutory separate estate existing and liable for the account when it was made, can defeat proceedings instituted to subject the estate to its payment.—*Ib.* 547.
7. *A mortgagee of land does not lose his lien by taking a mortgage executed by husband and wife.*—The mortgagee of land who holds it under such circumstances as will make him a bona fide purchaser against the mortgagor's wife, attempting to subject the land to the

SEPARATE ESTATE OF A MARRIED WOMAN—*Continued.*

payment of money belonging to her statutory separate estate, invested in it, does not lose the benefit of such mortgage by taking a second mortgage executed by the husband and wife to secure the payment of their note, extending the time for the payment of the debt. *Wilson v. Knight et al.* 172.

SET-OFF.

1. *Unliquidated damages can not be set-off against a certain debt, in equity.* Against a clear and certain debt, a court of equity will not set-off damages which are strictly unliquidated.—*Gafford v. Proskauer & Co.* 264.
2. *A set-off, available at law, may be used in equity against a mortgagee.* When the mortgagee seeks a foreclosure in equity, the mortgagor may set-off any debt or demand against the mortgagee, which would be the proper subject of set-off, if the mortgagee were suing at law for the mortgage debt.—*Ib.* 264.
3. *Damages sustained by disobedience of instructions in the sale of cotton are recoverable.*—Damages which the mortgagor has sustained by the mortgagee's violation of instructions to postpone the sale of his cotton, are under our statute a proper subject of set-off; and the measure of damages is the difference between the sum realized on the unauthorized sale, and the sum which would have been realized if the instructions had been obeyed.—*Ib.* 264.
4. *The mere right of set-off will not authorize a resort to equity.*—A mortgagor can not resort to equity for relief against the mortgagee, or mortgage debt, merely on the ground that he has a demand against the mortgagee which may be a proper subject of set-off.—*Ib.* 264.
5. *An agreement may be void for uncertainty.*—An agreement for the advancement of money which contains no specified sum, or any facts from which the sum may be ascertained, is void for uncertainty.—*Gafford v. Proskauer & Co.* 264.
6. *Courts of equity and law place the same construction on statutes of set-off.*—Courts of equity place the same construction upon the statutes of set-off that the courts of law adopt; and in the absence of special equities, the individual debt of an administrator is not available as a set-off to a demand due him in his representative capacity.—*Jones, Adm'r v. Brevard et al.* 499.
7. *Prior to the statute, there was no legal right to set-off one judgment against another.*—Prior to the statutes authorizing a set-off of judgments in courts of law, their interference for that purpose was subject to equitable considerations; and the set-off would not be allowed in violation of the right of an assignee of a chose in action. There was, then, no strict legal right to set-off one judgment against another. *Ex parte Lehman, Durr & Co.* 631.
8. *In a suit against a corporation by an employee, it may recoup damages caused by his fault.*—A railroad corporation may recoup damages resulting from the negligence of an employee in the performance of his contract of service, when sued by the employee to recover his wages. *Mob. & Mont. Railw. Co. v. Clanton*, 392.
9. *The measure of damages in such a case is fixed by a legal standard.* The measure of damages in such a case is fixed by a legal standard; and the corporation having the right to maintain an action against the employee, it may be sued by him to recover wages, set-off by plea such damages, and if the facts justified it, recover a judgment for the excess.—*Ib.* 392.

SHERIFF.

1. *A bond sued on can be impeached only by a special plea.*—When the complaint avers that the defendants executed a bond under seal, which

SHERIFF—*Continued.*

- is the foundation of the suit, they can not impeach its validity, or inquire into its consideration, except by special plea; or raise that question by objecting to the introduction of the bond as evidence.—*Johnson et al. v. Casley*, 331.
2. *A sheriff may make more than one official bond.*—Although a sheriff has been already inducted into office, and is acting under an official bond, duly accepted and approved, there is nothing to prevent him from voluntarily executing another official bond; if it be in form and is accepted and duly approved, he and his sureties will be liable upon it for any neglect, or other improper conduct.—*Ib.* 331.
3. *The court judicially knows who are the sheriffs of the different counties.* It is not necessary that the returns on the notices should state the county of which the officer executing them was sheriff. The courts are bound to know who are the sheriffs of the different counties. But a return that bears no date is defective.—*Timberlake v. Brewer*, 108.
4. *A sheriff may amend his return.*—A sheriff may, by leave of the court, during the pending of a motion against him, amend his return, although the amendment, if true, will relieve him from liability.—*Wilson v. Strobach*, 488.
5. *The interest of a partner may be sold to pay his individual indebtedness.* It is well established in this State that the separate creditor of one partner may take in execution that partner's interest in the tangible property of the partnership; but the purchaser at the sheriff's sale can not take into his exclusive possession the property which still remains subject to the debts of the partnership.—*Ib.* 488.
6. *The levy upon a partner's interest in an insolvent partnership may be released.*—A sheriff who has levied on the interest of one partner on the suit of his separate or individual creditor may release the levy, when the partnership is insolvent; and the sale of the partner's interest would have been unproductive of anything to satisfy the execution.—*Ib.* 488.
7. *On a motion against the sheriff he may prove the insolvency of the partnership.*—On a motion against the sheriff for his failure to collect the money due on the judgment, it is competent for him to prove the insolvency of the partnership.—*Ib.* 488.
8. *In an action against an officer, the actual injury is the measure of damages.*—In the absence of a statute inflicting a greater penalty, it is a general rule, in an action against an officer for neglect or other misconduct, the actual injury sustained is the measure of damages.—*Goy v. Burgess et al.* 515
9. *An officer, who neglects a plain duty, becomes a trespasser ab initio.* If a statute imposes a plain duty on a sheriff to deliver property to the party from whom it was taken, on failure of the plaintiff in a detinue suit to give the bond within the prescribed time, he has no discretion; and if he does not return the property, or deliver it to another person, he is guilty of trespass *ab initio*, and is liable of his official bond.—*Ib.* 575.
10. *In such a case, he can not plead the title of the plaintiff.*—In such a case, he can not set up the title of the plaintiff in the detinue suit, to prevent the recovery of damages for failure to restore the property to the defendant.—*Ib.* 575.
11. *Statutes allowing fees must be strictly construed.*—The statutes which allow fees to sheriffs and other officers for services rendered in prosecutions by the State for criminal offences, and in executing judgments rendered in such prosecutions, give costs, and must be strictly construed.—*Pollard v. Brewer*, 130.
12. *The State is not liable for the payment of turnkey fees.*—The State is not liable to sheriffs for the payment of turnkey fees.—*Ib.* 130.

SPECIFIC PERFORMANCE.

1. *An alleged willingness to comply with a contract is not a tender of payment.*—A specific performance of such a contract will not be decreed upon the allegation of the complainant, that he is ready and willing to comply with his contract in every particular, "and offering to do, whatever this court may order to be done in the premises respecting said Confederate money." This is not equivalent to an offer to pay whatever may be found due the defendant.—*Daughdrill v. Edwards*, 421.
2. *In an application for the specific performance of a contract, it should be distinctly averred.*—To sustain a decree of specific performance, the contract sought to be enforced must be clearly and distinctly averred; its terms must be definite and unequivocal, and the proof in support of it clear and unambiguous.—*Cox v. Cox et al.* 591.
3. *A specific performance will not be decreed unless the consideration of the contract clearly appears.*—Specific performance will not be decreed on averment that land was purchased by complainant and father-in-law for the benefit of complainant and wife, when it does not appear what was the consideration of the promise, or that the purchase was joint as alleged.—*Ib.* 591.

STATUTES. See CONSTRUCTION OF STATUTES.

STATUTE OF FRAUDS. See CONVEYANCE. FRAUDS.

1. *The promise, for a consideration, to pay the debt of another, is not within the Statute of Frauds.*—A promise of one person to pay the debt of another, made upon a new and valuable consideration beneficial to the promissor, is not within the Statute of Frauds.—*Graves v. Shulman, Goetter & Weil*, 406.

SUMMARY PROCEEDINGS. See PARTITION OF LAND. PLEADING.

1. *The notice to a defaulting tax-collector is both process and pleading.* In summary proceedings against defaulting tax-collectors, it is the settled practice to regard the notice of the motion for judgment as serving the double purpose of process and pleading. But the technical precision and accuracy of a declaration at common law is not required.—*Timberlake et al. v. Brewer*, 108.
2. *Its allegations should be reasonably certain.*—It is sufficient when the liability of the defendant, which is sought to be enforced, is stated with reasonable certainty, and the defendant is fairly apprised of the cause of action, and the court informed of the judgment it is called on to render.—*Ib.* 108.
3. *Ten days notice of the intended motion must be shown by the return.* Ten days notice to the party against whom judgment is to be rendered, is an essential element of the proceeding. When the fact does not appear from the return, the court is without jurisdiction. This deficiency can not be supplied by parol evidence.—*Ib.* 108.

TAXES. See SUMMARY PROCEEDINGS.

1. *It is the duty of the judge of probate to make an abstract of the assessment.*—It is the duty of the judge of probate of each county, within five days after the adjournment of the board of equalization to make and certify to the auditor a complete abstract of the assessment of all real and personal property in his county, showing the total amount and value of each class contained therein. If he discovers, after discharging the duty, that there are errors in the addition, he may lawfully correct them, and transmit a supplemental abstract to the auditor. The abstract, when filed in the office of the auditor, becomes a paper pertaining to the office, and is made evidence by the statute.—*Timberlake et al. v. Brewer*, 108.

TAXES—Continued.

2. *An expert may show that the addition is correctly made.*—An expert, whether employed or not, who has examined the assessment book, and added up the entries in the different columns, may, with the book the jury, point out the errors in addition previously made; the additions, as correctly made, and the true aggregate amount of the value of the taxable property of the county as shown by the book.—*Ib.* 108.
3. *The assessment book is the warrant of the tax-collector for the collection of taxes.*—The assessment book, when delivered to the collector, is an authority and warrant for the collection from each individual tax-payer of the tax assessed on property to him, whether the aggregate as shown by the certificate of the judge of probate is lessened or increased.—*Ib.* 108.
4. *The collector is, prima facie, chargeable with the taxes assessed.*—On the delivery of the assessment book to the collector, *prima facie* he became chargeable with the tax assessed to each tax-payer; and when the time allowed for collecting has expired, must be deemed to have collected it, unless he discharges himself by showing that in the mode prescribed he has obtained credit for it, as an error of assessment, or because of the tax-payer.—*Ib.* 108.
5. *The burden of proving the charge, when denied, rests on the plaintiff.* It is error to refuse a charge which substantially asserts that the burden of proving the cause of action devolves on the plaintiff, when it is denied, and satisfactory evidence of it must be produced, or he can not recover.—*Ib.* 108.
6. *The poll-tax must bear the expense of its assessment and collection.* Although the constitution requires that the money derived from the poll-tax shall be applied exclusively "in aid of the public school fund," it must bear the expense of its own assessment and collection. *Shaver v. Robinson*, 195.
7. *The Auditor can determine the amount of commissions due the assessor and tax-collector.*—The money raised by the poll-tax is not paid into the treasury of the State, but the Auditor, in settling with the tax-collector is clothed with authority to decide the amount of commissions due to the assessor and collector from the "poll-taxes in that settlement." Beyond this, his authority does not extend.—*Ib.* 195.
8. *The Auditor can not direct the commissions earned in one year to be paid from the taxes of another.*—The Auditor has no power to direct a tax-collector to retain from the poll-tax collected during the current year, the commissions earned by collecting this fund in preceding years.—*Ib.* 195.
9. *A person assessed imperfectly, has not escaped the assessor.*—One who has been assessed for taxation by the assessor, although in an imperfect manner, is not "a person who has escaped the assessor" within the meaning of the revenue law.—*Lehman, Durr & Co. v. Robinson*, 219.
10. *No assessment of property shall be made without notice to the tax-payer.* No assessment of property on the ground that it has escaped taxation should be made without notice to the tax-payer, if accessible; but the court does not decide that the assessment would be void if made without notice.—*Ib.* 219.
11. *To correct an improper assessment, the court's must not be sought in the first instance.*—If an erroneous, excessive or unauthorized assessment has been made, the remedy under existing laws does not lie in a resort to the courts in the first instance.—*Ib.* 219.
12. *The complaint of erroneous assessment should be made at the August term of the Commissioners' Court.*—When a complaint is made of a regular assessment, it must be brought before the Court of Commissioners (or courts exercising its powers), at the August term. And if

TAXES—*Continued.*

- the assessment has been made at an irregular time, complaint should be made to the first term afterwards.—*Ib.* 219.
13. *The collection of taxes should not be coerced till the Court of County Commissioners has acted in the case.*—If complaint be made that an assessment upon property which has escaped taxation is excessive, or illegal, it should not be collected by coercive process until the Court of County Commissioners has acted in the case. Upon its failure to correct an illegal or erroneous assessment, the courts of the country may redress the wrong.—*Ib.* 219.
 14. *The General Assembly can not declare an artificial value of property.* The constitution does not authorize the legislature to prescribe or declare an arbitrary or artificial value of the property of individuals, or corporations, and assess taxes on such valuation.—*Board of Assessment v. Ala. Cent. R.R. Co.* 551.
 15. *Section 383 of the Code of 1876 is unconstitutional.*—Section 383 of the Code of 1876, establishes a rule for the estimation of the value of railroad property for the purpose of taxation which is not authorized by the constitution; and, therefore, the assessment of taxes made in obedience to it is invalid, and was properly vacated by the City Court of Montgomery.—*Ib.* 551.

TENANCY IN COMMON.

1. *A contract to divide the products of a farm creates a tenancy in common of the products.*—A contract of lease which provides that the lessor and lessee of the land, shall divide the products between them, creates a tenancy in common of the products; and they should join in an action to recover damages for injuries done the growing crops.—*Pruitt v. Ellington*, 454.

TENDER.

1. *An alleged willingness to comply with a contract is not a tender of payment.*—A specific performance of such a contract will not be decreed upon the allegation of the complainant, that he is ready and willing to comply with his contract in every particular, "and offering to do, whatever this court may order to be done in the premises respecting said Confederate money." This is not equivalent to an offer to pay whatever may be found due the defendant.—*Doughdrill v. Edwards*, 424.

TIME. See LIMITATION.

TRESPASS.

1. *The distinction between action on the case and trespass is preserved.* The Code preserves the distinction between an action on the case and an action of trespass.—*Pruitt v. Ellington*, 454.
2. *Trespass is the remedy of a tort intentionally committed with force.* If a tort be intentionally committed with force, the immediate consequence of which is injury, trespass is the appropriate remedy; if, on the other hand, the injury proceeds from mere negligence, case is the proper action.—*Ib.* 454.
3. *Trespass is not the remedy for an injury caused by negligence.*—Under a count in trespass, evidence of an injury resulting from the negligence of the defendant will not authorize a recovery.—*Ib.* 454.
4. *Damages for injury to a growing crop can not always be recovered.* Damages for injury to a growing crop can not be recovered unless it was enclosed by such a fence as the Code requires.—*Ib.* 454.
5. *A railroad corporation may commit trespass.*—Railroad corporations may commit trespass.—*Mob. & Mont. Railw. Co. v. McKellar*, 458.
6. *An action of trespass can not be changed by amendment.*—An action of

TRESPASS—*Continued.*

trespass can not be changed by an amendment of the complaint into a special action on the case.—*Ib.* 458.

7. *An officer, who neglects a plain duty, becomes a trespasser ab initio.* If a statute imposes a plain duty on a sheriff to deliver property to the party from whom it was taken, on failure of the plaintiff in a detinue suit to give the bond within the prescribed time, he has no discretion; and if he does not return the property, or delivers it to another person, he is guilty of trespass *ab initio*, and is liable on his official bond. *Gay v. Burgess*, 575.
8. *In such a case, he can not plead the title of the plaintiff.*—In such a case, he can not set up the title of the plaintiff in the detinue suit, to prevent the recovery of damages for failure to restore the property to the defendant.—*Ib.* 575.

TROVER.

1. *The action of trover must be prosecuted by the person having the legal title.*—The action of trover is not within the influence of the statute which authorizes suits to be brought by a party, having only a beneficial or equitable interest, as distinguished from the legal title. It must be commenced and prosecuted in the name of the party having the legal title.—*McNutt et al. v. King et al.* 597.
2. *In an action of trover by partners a plea of bankruptcy of one of them is sufficient.*—In an action by partners for the conversion of partnership property, a plea which avers the bankruptcy of one of them is a good and sufficient plea in bar.—*Ib.* 597.

UNLAWFUL DETAINER.

1. *A judgment in a case of unlawful detainer against the lessee, will not prevent a resort to equity.*—A judgment against the lessee, in the statutory action of unlawful detainer, will not preclude a resort to equity; the right to possession is alone involved, and no recoupment or set-off is allowable, for the lessor's breach of his covenants.—*Abrams v. Watson*, 524.

USURY.

1. *Usury is no defence to an action, on renewed notes held by an innocent holder.*—The plea of usury is no defence to a suit on a promissory note, when the maker renewed it in the hands of a subsequent holder, who gave full value for the note, and had no knowledge of the usury. *Mitchell v. McCullough*, 179.
2. *A stranger can not object that a contract is usurious.*—It is well settled that a stranger to a transaction will not be allowed to object that there was usury in it.—*Griel & Bro. v. Lehman, Durr & Co.* 419.
3. *The holder of a note secured by mortgage is regarded as a bona fide purchaser.*—A creditor who permits a debtor to substitute for his note upon which is a solvent surety, a note made by the debtor alone, secured by mortgage, must be regarded as a *bona fide* purchaser, when the note is assailed as usurious by one, who is neither the personal representative of the debtor, nor his surety.—*Wilson v. Knight et al.* 172.

VAGRANCY. See CRIMINAL LAW.

VENDOR.

1. *It is sufficient if the vendor have a title when the vendee can demand a deed of conveyance.*—When the vendee knew the condition of the title at the time of his purchase, and that his vendor had not fully paid for the land, any charge or presumption of fraud based on that ground, will be repelled. It is sufficient if the vendor have title when the

VENDOR—*Continued.*

vendee is in condition to demand a deed of conveyance.—*Teague v. Wale*, 369.

2. *The value of land sold during the war must be estimated in lawful money at the time of the sale.*—The value of land sold under the circumstances shown by the record in this case is the value of the property in lawful money at the time of the sale.—*Doughdrill v. Edwards*, 424.

VENUE. See CRIMINAL LAW.

WAIVER. See CRIMINAL LAW.

WARRANTY.

8. *If the vendor knows the purpose of the purchaser, and represents the property as fit for it, the representation will be an implied warranty.* On a sale of property which is present and open to examination by the purchaser, there is no implied warranty of its fitness for any particular use. But if the vendor is informed that the vendee is buying the property for a particular use, a representation by the seller of its fitness, is an implied, if not an express, warranty.—*Perry v. Johnston et al.* 648.

WITNESS. See CRIMINAL LAW.

1. *A witness may be recalled.*—It is within the discretion of the court to have a witness recalled and further cross-examined, after he has been discharged from the witness stand.—*Morningstar v. The State*, 30.
2. *The judge should not converse with a witness privately.*—It is not within the province of a judge to converse privately, either in or out of court, with a witness, to ascertain whether he has knowledge of particular facts; or to suggest to the witness, after his examination, that there are facts other than those to which he has testified, within his knowledge.—*Sparks v. The State*, 82.
3. *A witness can not testify as to the appearance of the prisoner.*—Evidence that the prisoner "looked downcast," expresses merely the opinion of the witness, and is inadmissible.—*McAdory v. The State*, 92.

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